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IN THE

Supreme Court of the United States

JOE ALFRED IZEN, JR. AND KAREN SUTER IZEN,

Petitioners,

v.

TERRANCE CATALINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

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QUESTION PRESENTED

Whether a plaintiff asserting a *Bivens* claim of retaliatory prosecution under the First Amendment must prove that law enforcement agents lacked probable cause to pursue the prosecution.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case that Petitioner cannot maintain a *Bivens* action for retaliatory prosecution in violation of the First Amendment because Respondent had probable cause to pursue an investigation.

OPINIONS BELOW

The opinion of the court of appeals on rehearing, App., *infra*, 1a, is reported at 398 F.3d 363. The original panel opinion of the court of appeals, App., *infra*, 12a, is reported at 382 F.3d 566. The opinion of the district court, App., *infra*, 25a, is reported at 251 F. Supp. 2d 1327. A prior opinion of the court of appeals, App., *infra*, 61a, is reported at 256 F.3d 324.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2005. App., *infra*, 1a. Petitioner's request for rehearing en banc was denied April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether federal officers who use the prosecutorial function to silence speech escape liability under *Bivens* if there was probable cause to pursue the prosecution. The Court has granted review in a case

presenting this very question. *See Hartman* v. *Moore*, No. 04-1475, *cert. granted*, 554 U.S. ___ (June 27, 2005). *Hartman* presents the question "[w]hether law enforcement agents may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause."

1. Izen's Representation of Tax Defendants. Petitioner Joe Izen is a tax attorney who has successfully represented taxpayers for more than twenty years. In the course of his career, Petitioner has won numerous battles against the IRS. *E.g.*, *Dixon* v. *Comm'r*, 316 F.3d 1041 (9th Cir. 2003) (vacating tax court decision upholding deficiencies because IRS committed fraud on the court); *United States* v. *Troescher*, 99 F.3d 933 (9th Cir. 1996) (applying Fifth Amendment right against self-incrimination to tax cases); *United States* v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983) (reversing convictions of tax shelter promoters for lack of intent because legality of program was unsettled); *Cochran* v. *Comm'r*, 56 T.C.M. (CCH) 1433 (T.C. 1989) (declining to find taxpayer committed fraud or negligence by participating in trusts because a "reasonable person would have believed that the ALA plan offered an opportunity for legitimate tax savings").

2. Respondent's Investigation and Prosecution of Petitioner. In August 1989, Respondent, an IRS agent, received a referral containing an informant's allegations that Petitioner had not filed income tax returns for 1986, 1987, and 1988, and that Petitioner was involved in money laundering. App., *infra*, 2a. Respondent soon determined that the informant was not reliable, and that there was an insufficient basis to investigate Petitioner for money laundering. *Id.* at 2a-3a. Respondent nevertheless recommended opening a criminal investigation into Petitioner's missing tax

returns in October 1989. *Id.* at 3a. Respondent also recommended that Petitioner be investigated for failing to file a return for 1985, even though Petitioner had filed a return for that year. *Id.* Petitioner's 1986 return was filed a month before Respondent's recommendation that he be investigated for failing to file that return. *Id.* Unaware of the criminal investigation, Petitioner soon filed his 1987 and 1988 returns, which showed he was owed refunds for both years. Respondent subsequently approved refunds to Petitioner for the years 1986, 1987, and 1988 and ended the investigation. *Id.*

Despite having previously determined that there was no basis upon which to investigate Petitioner for money laundering, Respondent proceeded to launch a money laundering investigation. IRS investigative reports written and reviewed by Respondent show that Petitioner's representation of tax clients and his association with tax protestors were prominently mentioned as reasons to investigate Petitioner. *Id.*

Respondent arranged a "sting" operation, in which another agent, James Climer, posed as a businessman with hundreds of thousands of dollars from the sale of stolen oil. *Id.* at 3a. Climer sought Petitioner's advice for his "tax problem." Respondent taped conversations between Petitioner and Climer, in which Petitioner unequivocally advised Climer to report the illegal income on his personal and partnership income tax returns.

Petitioner also told Climer, correctly, that he and his partner could establish a foreign trust, exchange their assets for beneficial interest certificates, and legitimately borrow funds from the trust, so long as they paid interest on the loans, repaid the loans, and the trust reported and paid taxes on the interest income in the United States.

Respondent's investigation lasted from 1990 to 1992. In 1994, Petitioner won a significant case against the IRS in which the agency was found to have committed

fraud on the court by attempting to fix a "test case" regarding certain tax shelters and by bribing witnesses. *DuFresne* v. *Comm'r*, 26 F.3d 105, 107 (9th Cir. 1994). Soon thereafter, in May, 1995, Respondent testified before the grand jury that eventually indicted Petitioner. When asked why he targeted Petitioner, Respondent stated that "he's legal counsel as far as trusts and things," and that "he's saying, you know, these trusts are legal, they are valid. He is writing legal opinions that people are relying on to, in turn, use these trusts." *Id.* at 35a n.8. The grand jury returned a four-count indictment for conspiracy, attempt, and aiding and abetting money laundering but did not indict Petitioner on any tax charges.

Petitioner opposed the charges against him. A year later, the United States moved to withdraw the presentment of the indictment and all criminal charges against Petitioner were dropped. *Id.* at 4a.

3. Respondent's Improper Retaliatory Motive. As the original panel opinion below noted, Respondent "was well aware of Izen's representation of criminal tax defendants" when he initiated the money laundering investigation. *Id.* at 21a. Numerous documents show that Petitioner's representation of tax clients figured prominently in Respondent's decisions to investigate and prosecute him, while none of them indicated that Petitioner had engaged in money laundering.

For example, the case analysis Respondent submitted in October, 1989 noted that Petitioner "is an attorney who specializes in representing tax protesters," and that he "has represented several protestors in the Houston areas and all across the country. He is very well known in the tax protest movement." *Id.* (quoting record excerpts). Further, Respondent specifically cited Petitioner's successful representation of tax clients when he later requested permission to conduct an undercover

sting operation: "Izen is very well known throughout the country. He has represented tax protesters from the East coast to the West coast. Izen represented Dahlstrom before the Ninth Circuit. Dahlstroms's conviction was reversed. The case had to do with a foreign trust scheme devised to create sham tax deductions." *Id.* The panel noted that "much of the information Catalina relates about Izen pertains to his representation of clients in his professional capacity." *Id.* at 21a. Nevertheless, "Catalina concludes that 'Izen's actions demonstrate that he has very little regard for the tax laws and is predisposed to launder money.'" *Id.* (quoting record excerpts).

A "Case Summary" from December 1989 contained the following "Allegations" against Petitioner: "Izen is a well known tax protestor attorney in the Houston area. He files personal returns on an irregular basis, and they are always filed late. He was head of the legal dept. for Nassau Life Insurance, a tax shelter in the Bahama Islands. He had close ties to the Center for Independence for Judges and Lawyers . . . ." *Id.* at 21a (quoting record excerpts).

The panel's opinion further noted that nothing in the "primary sources of information Catalina relied on . . . connects Izen to money laundering." *Id.* at 22a. A 1986 Summary Report concerning Nassau Life Insurance details a tax shelter, along with various individuals and groups associated with the originator of the shelter, but "none is accused in the report of laundering money." *Id.* Petitioner is only mentioned once: "Izen is an attorney out of Houston, Texas. He has issued tax opinions for Nassau Life. According to intelligence that we have acquired, Izen has been representing Nassau Life since June 1983. IRS discontinued an investigation of Izen in April 1984." *Id.* at 22a. The panel thus concluded that "both the reports prepared by Catalina and those he reviewed prominently refer to Izen's associations with

unpopular targets of the IRS, but contain scant, if any, evidence of money laundering, the purported purpose of the investigation." *Id.* at 24a.

Respondent's testimony before the grand jury provides further evidence of his retaliatory animus against Petitioner. Respondent testified that Petitioner was targeted because of the advice he was giving tax clients. *Id.* at 34a-35a n.8. Respondent's investigation and prosecution of Petitioner were designed to retaliate against Petitioner for his successful and effective representation of tax defendants over the course of his career.

4. **Petitioner's Lawsuit.** In 1997, Petitioner filed suit against Respondent, Agent Climer, and the United States. Petitioner asserted, *inter alia*, that the defendants violated his First Amendment right to be free from prosecution in retaliation for representing tax defendants and that defendants violated his Fourth Amendment right to be free from malicious prosecution. The district court dismissed all of Petitioner's claims, but the Fifth Circuit reversed as to Petitioner's First Amendment retaliation claim and his Fourth Amendment malicious prosecution claim. *Id.* at 61a-70a. The court held that the district court had "misconstrued the applicable law on both." *Id.* at 4a. With regard to the retaliatory prosecution claim, the court held that "neither the district court nor the IRS agents explain the connection between Izen's late filing of tax returns and the agents' decision to begin an undercover sting operation to investigate possible money laundering through offshore trusts." *Id.* at 67a.

On remand, the district court again granted summary judgment in favor of the defendants on all of Petitioner's claims. Petitioner once more appealed to the Fifth Circuit. The panel issued a decision in which it affirmed the dismissal of Petitioner's Fourth Amendment

claim, but reversed the dismissal of the First Amendment retaliatory prosecution claim. *Id.* at 12a-24a.

The court noted that "plaintiffs must establish three elements in order to make out a retaliation claim." *Id.* at 18a. Plaintiffs must establish first, that "they were engaged in constitutionally protected activity"; second, that "defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and third, that "the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Id.* quoting *Keenan* v. *Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The court then noted that the Fifth Circuit also requires plaintiffs to establish the common-law elements of malicious prosecution, including lack of probable cause. *Id.*

The court stated that although "the government need not have even reasonable suspicion to undertake an investigation . . . this is beside the point." *Id.* at 18a-19a "Izen's claim, properly understood, is not that Catalina violated the First Amendment by undertaking an investigation without reasonable suspicion, but rather that he violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against Izen for his advocacy on behalf of unpopular criminal tax defendants." *Id.* at 19a. The court went on to hold that Petitioner's claim was clearly established and that Respondent was not entitled to qualified immunity. *Id.* at 24a ("A reasonable agent would not have believed it permissible to investigate and prosecute an attorney in order to discourage him from opposing the IRS.").

Five months later, the Fifth Circuit entered a second opinion on panel rehearing. In its revised opinion, the court eliminated its lengthy recitation of the lack of any evidence that Respondent had engaged in money laundering. Instead, the court presented a list of facts

provided by the "unreliable informant" which, along with innocuous information about Petitioner's "knowledge about offshore banking," Nassau Insurance, and association with a single individual, purportedly constituted "verifiable, independent information concerning Izen's questionable activities that amounted to probable cause." *Compare* App., *infra*, 20a-23a *with id.* at 9a-10a. The court went on to conclude that the evidence gathered by Respondent and the grand jury "demonstrates probable cause as a matter of law." Consequently, the court held that "because [Petitioner] is unable to create a triable issue of fact as to whether probable cause existed when he was indicted, the district court thus properly granted summary judgment to Catalina on the retaliation claim." *Id.* at 11a.

The Fifth Circuit's opinion on rehearing thus turned on its new finding that Petitioner could not establish lack of probable cause. Were it not for the Fifth Circuit's requirement that a retaliatory prosecution plaintiff must show lack of probable cause, the grant of summary judgment to Respondent would have been reversed.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Fifth Circuit Conflicts With That Of Three Other Circuits.

The Fifth Circuit's opinion in this case expressly recognizes the split among the circuits on whether a *Bivens* plaintiff must prove absence of probable cause to maintain a First Amendment Retaliation claim.[1] App.,

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[1] A cause of action for deprivation of constitutional rights against federal officers under *Bivens* is analogous to a similar action against state officers under 42 U.S.C. § 1983, and therefore the standards applicable to cases decided under § 1983 apply equally to *Bivens* actions, and vice versa. *E.g.*, (...continued)

infra, 8a n.7. Three circuits hold, in conflict with the holding below, that probable cause does not decide the question of whether a governmental official retaliated against a *Bivens* plaintiff in order to chill the exercise of constitutionally protected rights. On the other hand, three circuits agree with the Fifth, that a plaintiff alleging retaliatory prosecution must prove lack of probable cause in order to prevail.

The circuit split described in the Fifth Circuit's opinion warrants review by this Court. Seven circuits have spoken definitively on the issue, including two within the last year. Indeed, the Court has already granted certiorari to decide this issue in *Hartman* v. *Moore*.

A. The Sixth, Tenth, and District of Columbia Circuits Do Not Require Absence Of Probable Cause To Maintain A First Amendment Retaliation Claim.

Three circuits have held that absence of probable cause is not properly an element of a First Amendment retaliation claim.

Most recently, the District of Columbia Circuit held that "the clearly established law of [the D.C.] circuit barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so." *Moore* v. *Hartman*, 388 F.3d 871, 873 (D.C. Cir. 2004), *cert. granted*, *Hartman* v. *Moore*, No. 04-1475, 554 U.S. ___ (June 27, 2005). In *Moore*, the plaintiff was indicted in connection with a kickback scheme involving postal officials, but the district court dismissed the case due to "a

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Butz v. *Economou*, 438 U.S. 478, 500-01 (1978). Accordingly, this Petition discusses both *Bivens* and § 1983 actions.

complete lack of direct evidence to suggest the Defendants knew of the illegal payoff scheme." 388 F.3d at 874 (quotation marks omitted). As here, the plaintiff sought damages for retaliatory prosecution under *Bivens*, but the defendants argued that the existence of probable cause should defeat the claim. *Id.* at 877.

The D.C. Circuit disagreed. The court applied its precedent, *Haynesworth* v. *Miller*, 820 F.2d 1245 (D.C. Cir. 1987), which states that the "essential elements" of a retaliatory prosecution claim are: 1) that "the conduct allegedly retaliated against or sought to be deterred was constitutionally protected"; and 2) that the "prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." 388 F.3d 877-78. If the plaintiff meets his burden on both issues, the defendant must then show that "the same decision as to whether to prosecute" would have been made "even had the impermissible purpose not been considered." *Id.* (quoting *Haynesworth*, 830 F.2d at 1257 n.93. *Haynesworth* did not "suggest that lack of probable cause is an element of the claim, nor does its silence imply such a requirement." *Id.* "[O]nce a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway." *Id.* at 878. The court noted that probable cause "usually represents only one factor among many in the decision to prosecute." Therefore, "there is no reason to expect that the mere existence of probable cause will suffice" to allow government officials to escape liability. *Id.*

The court further noted that its holding is supported by this Court's holding in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). *Id.* at 879. As in *Mt. Healthy*, if the plaintiff could show his constitutionally protected activity was a "motivating factor" in the defendant's decision, the burden would shift to defendant to show "it would have

reached the same decision even in the absence of the protected conduct." *Id.* (quoting *Mt. Healthy*, 429 U.S. at 287).

Like the D.C. Circuit, the Sixth Circuit has held that probable cause does not necessarily negate a retaliatory prosecution claim. In *Greene* v. *Barber*, plaintiff was arrested after making disparaging remarks to a police officer. 310 F.3d 889, 892 (6th Cir. 2002). The Sixth Circuit held that "a respectable argument can be made" that the officer had probable cause to believe that plaintiff was violating the law. The court further stated: "however, the existence of probable cause is not determinative of the constitutional question if, as alleged here, the plaintiff was arrested in retaliation for his having engaged in constitutionally protected speech." *Id.* at 894. "The law is well established that 'an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason would have been proper.'" *Id.* (quoting *Bloch* v. *Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998).

The Tenth Circuit has similarly held that "an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) (quoting *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)). In *Poole*, the plaintiff was charged with careless driving after speeding through Alamogordo, New Mexico. *Id.* at 958. Poole's lawyer wrote to the defendant county, requesting that it preserve evidence of the incident. *Id.* Soon thereafter, the county withdrew the careless driving charge and filed a new complaint charging Poole with six counts of reckless driving, along with resisting and evading arrest. *Id.* Poole brought suit, alleging that his lawyer's letter was notice that Poole might file a civil suit against the county, and that the

county increased the charges against him in an attempt to stifle his First Amendment right to bring such a suit. *Id.* at 961. The county responded that Poole's behavior justified the stiffer charges. *Id.* The Tenth Circuit held, however, that "[t]he propriety of charging Mr. Poole in light of his conduct during the pursuit is not relevant to his First Amendment claim." *Id.*

Three circuits thus hold that probable cause is irrelevant to a claim of retaliatory prosecution under the First Amendment.[2] If Petitioner's suit arose in the Sixth, Tenth, or District of Columbia Circuits, his claim would have gone forward. Instead, Petitioner's claim was dismissed based solely on a finding that there was probable cause to investigate him. App., *infra*, 11a.

B. The Second, Fifth, Eighth, and Eleventh Circuits Require Plaintiff To Prove Lack of Probable Cause.

Four circuits have taken the contrary position that probable cause is a complete defense to a retaliatory prosecution claim. The Fifth Circuit requires probable cause because it is an element of the common law tort of malicious prosecution. Other circuits have simply found that a showing of probable cause defeats a retaliation claim.

In the Fifth Circuit's opinion on rehearing below, the court held that plaintiffs alleging retaliatory prosecution must establish "each of the common law

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[2] The Fifth Circuit's opinion asserts that the Seventh Circuit also does not require proof of the lack of probable cause. App., *infra*, 8a n.7. However, the Seventh Circuit has thus far declined to decide the question. *See Abrams* v. *Walker*, 307 F.3d 650, 657 (7th Cir. 2002) (declining to rule on whether "probable cause is a complete defense to a First Amendment retaliation claim in the context of an arrest").

elements of malicious prosecution." App., *infra*, 7a. One of these elements is "an absence of probable cause to prosecute." *Id.*, quoting *Keenan* v. *Tejeda*, 290 F.3d 252 (5th Cir. 2002).

Other circuits do not base the requirement of lack of probable cause on the common law elements of malicious prosecution. For instance, the Second Circuit held, in *Mozzochi* v. *Borden*, 959 F.2d 1174 (2d Cir. 1992), that if probable cause exists "independent of the defendants' motive . . . the defendants' motive need not be examined." *Id.* at 1180. *Mozzochi* involved a plaintiff who had sent a series of critical letters to his Town Manager and members of the Town Council. *Id.* at 1175-76. When plaintiff mailed a newspaper clipping about a disgruntled citizen who had murdered the mayor of an Iowa city, he was prosecuted for criminal harassment. *Id.* at 1176. The prosecutor offered to drop the charges in exchange for a release of civil claims, but the plaintiff refused. *Id.* The prosecutor then dropped the charges before the trial was complete. *Id.* In the plaintiff's retaliatory prosecution suit, the Second Circuit held that the plaintiff could not sustain a claim for retaliation if the criminal prosecution was supported by probable cause because "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government." *Id.* at 1180. The Second Circuit found it significant that the plaintiff was not actually chilled, in that he continued his criticism of the public officials despite the prosecution. *Id.*

The Eighth Circuit has also held that probable cause can defeat a claim of retaliatory prosecution. In *Smithson* v. *Aldrich*, 235 F.3d 1058 (8th Cir. 2000), plaintiff, an owner of a bar, challenged his arrest for violating a noise ordinance, stating that the arrest was a pretext for the police officers' disagreement with

statements he made to concert attendees. The Eighth Circuit held that the police officers were necessarily entitled to qualified immunity because the arrest was justified by probable cause and therefore objectively reasonable even if plaintiff could prove the officers intended to retaliate against him for his statements. *Id.* at 1063.

Finally, the Eleventh Circuit also holds that the existence of probable cause bars a First Amendment retaliation claim. *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("[T]he existence of probable cause to arrest [plaintiff] defeats her First Amendment claim" that she was arrested in retaliation for her constitutionally protected speech.).[3]

These four circuits thus directly conflict with the Sixth, Tenth, and District of Columbia Circuits on the Question Presented. Only this Court can resolve the

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[3] Contrary to the Fifth Circuit's assertion, App., *infra*, 8a n.7, the Third Circuit does not hold that probable cause bars a First Amendment retaliation claim. In *Merkle* v. *Upper Dublin School District*, 211 F.3d 782 (3d Cir. 2000), the Third Circuit reversed summary judgment in favor of school officials that had pursued theft charges against a teacher who attempted to donate surplus art supplies. The court held that the question of whether defendants' actions were retaliatory is "influenced by the strength of [plaintiff's] claim against them for common law malicious prosecution." *Id.* at 794. However, lack of probable cause is only one element of the common law tort of malicious prosecution. *See, e.g.*, App. *infra*, 32a. In *Merkle*, the court determined that the school officials did not have probable cause to believe the plaintiff had committed theft. *Id.* at 795. The court thus did not have occasion to determine whether the existence of probable cause would "influence" the retaliation question so as to necessarily defeat a claim of retaliatory prosecution under the First Amendment. *Cf. Moore*, 388 F.3d 878 ("[P]robable cause usually represents only one factor among many in the decision to prosecute.").

disagreement among the circuits and bring uniformity to this important area of the law.

II. Probable Cause Is Not A Proper Element Of A First Amendment Retaliation Claim.

A straightforward application of this Court's precedents requires that a plaintiff alleging First Amendment Retaliation need not prove the absence of probable cause. The Court's decision in *Mt. Healthy* adopts the burden-shifting approach applied by the D.C. Circuit in *Moore*. Further, the Court has rejected the approach that unconstitutional retaliation claims are defeated based solely on objective validity, regardless of improper intent. The Sixth, Tenth, and D.C. Circuits are thus correct to hold that probable cause does not defeat a claim of retaliation under the First Amendment. Those circuits that hold otherwise have erroneously conflated the common law requirements of malicious prosecution with those of First Amendment retaliation, or have failed to articulate any basis at all for their holdings.

In *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), this Court established that government actors who retaliate against the exercise First Amendment rights may be sued even if the action in question would have been proper if it were taken for a different purpose. *Mt. Healthy* concerned a high-school teacher who was discharged in part for statements made on a radio program. Although the teacher could have been terminated for any reason or no reason at all, the Court held that he could "nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.* at 283-84. The Court adopted a burden-shifting analysis for retaliation claims. *Id.* at 287. First, the plaintiff has the burden "to show that his conduct was

constitutionally protected." *Id.* Second, he must show that the conduct was a "substantial" or "motivating" factor in the adverse action. *Id.* The burden then shifts to defendant, who must show "that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* This general rule applies to retaliatory prosecutions. *See Wayte* v. *United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard . . . including the exercise of protected . . . constitutional rights.") (marks and citations omitted).

The D.C. Circuit was thus correct adopt this same balancing test to the question of retaliatory prosecutions. *Haynesworth*, 820 F.2d at 1257. The result is "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy*, 429 U.S. at 286. The alternative, adopted by the Fifth Circuit below, allows a result caused by a constitutional violation to stand so long as probable cause is present.

The Court has already rejected the proposition that retaliation claims are defeated based solely on objective validity, regardless of improper intent. In *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), a prisoner claimed that a prison official had misdirected the prisoner's personal belongings in retaliation for the prisoner's exercise of his First Amendment rights. The D.C. Circuit held that such a claim was subject to a heightened pleading standard, but this Court declined to adopt that view. 523 U.S. at 601. The Court held that a government official defending against a retaliation claim is not entitled to qualified immunity simply because the official's conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted); *see also id.* at 593 (citing *Mt. Healthy*).

The Court rejected the proposition advanced in dissent that "once the trial court finds that the asserted

grounds for the official action were objectively valid . . . it would not admit any proof that something other than those reasonable grounds was the genuine motive." *Id.* at 612 (Scalia, J., dissenting).[4] Thus, the Fifth Circuit is incorrect to allow an objective showing of probable cause to defeat a retaliation claim regardless of improper retaliatory intent.

The lower court decisions holding that a showing of probable cause defeats a First Amendment retaliation claim are unpersuasive. By and large, these decisions either assert that a plaintiff claiming retaliatory prosecution must also show the elements of common law malicious prosecution (as in the Fifth Circuit below, App., *infra*, 7a) or simply state that probable cause defeats the claim *Dahl*, 312 F.3d at 1236; *Mozzochi*, 959 F.2d at 1179. The decisions do not point to any textual, policy, or other reason why this should be so. Nor do they reconcile their holdings with this Court's holdings in *Mt. Healthy* and *Crawford-El*.[5]

Petitioner alleges that Respondent retaliated against him not only by pursuing an indictment and prosecution, but also by commencing a criminal investigation for alleged money laundering. As the court of appeals noted, a criminal investigation generally may be commenced in the absence of probable cause to believe

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[4] Some of the dissenting Justices in *Crawford-El* would have allowed qualified immunity to a public official accused of retaliation if the official could offer a legitimate reason for the action in question and the plaintiff could not establish pretext by objective evidence. *Id.* at 602 (Rehnquist, C.J., dissenting). The Fifth Circuit's holding in this case does not allow a plaintiff to show that the official's purported reason was pretextual.

[5] The Eighth Circuit states that it applies an "objective and not a subjective standard," the very proposition rejected by the Court in *Crawford-El*. *Smithson*, 235 F.3d at 1063.

that a crime has been committed. *See* App., *infra*, 18a-19a citing *United States* v. *Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991).

Lack of probable cause thus cannot properly be an element of Petitioner's retaliatory investigation claim. It would be inappropriate to require law enforcement officers to satisfy a probable cause requirement at the outset of a criminal investigation if—but only if—the subject of the investigation subsequently alleges that the investigation was undertaken in retaliation for the exercise of First Amendment rights. But it also would be inappropriate to allow investigators to use criminal investigations as a weapon to punish individuals for exercising First Amendment rights, and chill the exercise of those rights, simply because criminal investigations generally may be commenced in the absence of probable cause. Because this case presents both the criminal investigation and the indictment contexts, and because consideration of the investigation context may shed light on the indictment and prosecution contexts, the Court may wish to grant review in this case as well as *Hartman*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in this case should be held pending the outcome of No. 04-1475, *Hartman* v. *Moore*.

Respectfully submitted,

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

July 2005

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOE ALFRED IZEN, JR. AND KAREN SUTER IZEN,

Petitioners,

v.

TERRANCE CATALINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

JULY 2005

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APPENDIX

REVISED JANUARY 26, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21182

JOE ALFRED IZEN, JR.; KAREN SUTER IZEN,
Plaintiffs - Appellants,

VERSUS

TERRANCE CATALINA, Special Agent, Individually;
JAMES CLIMER, Special Agent, Individually;
UNITED STATES OF AMERICA,
Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston

OPINION ON REHEARING

Before JONES, MAGILL,* and SMITH, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Joe Alfred Izen, Jr., a Texas attorney, appeals the district court's order granting summary judgment in favor of IRS agents Terrance Catalina and James Climer. Izen's Bivens action alleges that Catalina and Climer engaged in malicious prosecution and retaliation in violation of the Fourth and First Amendments, respectively, when they investigated and prosecuted him for money laundering. The district

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* Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

court, acting on remand from this court in *Izen v. Catalina*, 256 F.3d 324 (5th Cir. 2001) ("Izen I"), granted summary judgment in favor of the agents on Izen's Fourth Amendment malicious prosecution claim on the ground that Izen did not meet the common law elements of that tort. It granted the agents' motion for summary judgment on Izen's First Amendment retaliation claim for the same reason, and held in addition that Izen had not raised a genuine issue of material fact as to the agents' retaliatory motive. The court also granted the United States' motion for summary judgment on Izen's Federal Tort Claims Act claims of malicious prosecution, false arrest, intentional infliction of emotional distress, and negligence. Izen appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's grant of summary judgment as to all claims.

I.

Izen is a tax attorney. He has long represented tax protestors and other defendants in criminal tax cases. In August 1989, IRS agent Catalina received a referral from the Waco, Texas, IRS collection office alleging that Izen had not filed income tax returns for tax years 1986, 1987, and 1988. The referral contained allegations from a third party informant that Izen was involved in money laundering, including allegations that Izen was involved in the failure of a private bank and had accounts in foreign countries. Catalina soon deemed the informant unreliable. Izen alleges the informant was Michael J.B. Easton, who had an indictment pending against him at the time and, according to Izen, aided Izen's ex-wife in surreptitiously withdrawing a large sum of money from an account of Izen's.

In October 1989, Catalina accepted the referral for investigation of the charge of failure to file tax returns. He determined there was insufficient basis to investigate Izen for money laundering, but recommended opening a criminal income tax investigation for the years 1986

through 1988 based on the missing returns. Catalina also recommended including 1985 in the investigation, though a return had been filed. Catalina's tax investigation was soon derailed by the fact that Izen ultimately filed his 1986 return in September 1989, and filed his 1987 and 1988 returns in April 1990, even receiving refunds approved by Catalina.

Although Catalina dropped the income tax investigation, he then embarked on a money laundering investigation. Izen alleges that the impetus for the investigation was a desire to retaliate against him for his history of association with tax protestors, his representation of criminal tax defendants, and his representation of taxpayers utilizing foreign trusts to reduce their federal income tax. *See, e.g., United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983) (reversing the convictions of foreign tax shelter promoters, one of whom was represented by Izen). Izen's contention finds support in IRS investigative reports that prominently mention both Izen's association with tax protestors as well as his successful representation of tax clients. Catalina in turn alleges that the investigation was prompted by his review of various reports concerning a client of Izen's, Nassau Life Insurance Company Limited ("NLIC"), and persons and banks related to or doing business with that entity.

Upon reviewing the reports concerning Izen's client, Catalina, with the permission of his superiors, commenced an undercover investigation of Izen himself which lasted from 1990 to 1992. Climer was the undercover agent assigned to the investigation. Climer posed as a client seeking to create a foreign trust in which to deposit proceeds from the sale of purportedly stolen oil. Numerous conversations between Izen and Climer were apparently taped, though the agents have not placed any

of the recordings in the record.[1] Catalina testified before a grand jury in May 1995, and it returned a four-count indictment of Izen for conspiracy to commit money laundering and aiding or abetting or attempting money laundering. Izen alleges that the indictment was secured in part due to alleged misrepresentations made by Catalina to the grand jury.[2] In May 1996, for undisclosed reasons, the United States moved to withdraw the presentment of the indictment and all criminal charges against Izen were dismissed.

Izen brought suit in 1997, alleging various constitutional and non-constitutional torts. The district court dismissed all of Izen's claims. Izen appealed the dismissal of his Fourth Amendment malicious prosecution claim, his First Amendment retaliation claim, his Fifth Amendment claim, the denial of his motion for disclosure of grand jury materials, and the grant of summary judgment in favor of the agents based on their qualified immunity defense.

In *Izen I* we reversed the dismissal of the malicious prosecution and retaliation claims, holding that the district court had misconstrued the applicable law on both. In addition, we held that a genuine issue of material fact existed as to whether Izen was investigated and prosecuted in retaliation for representing criminal tax defendants. We affirmed the dismissal of Izen's Fifth Amendment claim as well as the denial of his motion for disclosure.

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[1] Izen placed in the record those portions of the recordings which he argues are exculpatory.

[2] Only a small fraction of Catalina's grand jury testimony is in the record. Because of Izen's allegations, the district court did not rely on the indictment.

On remand, Izen filed a second amended complaint in which he added a Federal Tort Claims Act cause of action against the United States. The district court again granted summary judgment in favor of the agents and United States on all claims. Izen appeals the grant of summary judgment on his malicious prosecution claim, his retaliation claim, and his Federal Tort Claims Act cause of action.

II.

This court reviews a grant of summary judgment *de novo*. *Chriceol v. Phillips*, 169 F.3d 313, 315 (5th Cir. 1999). We may affirm a grant of summary judgment on grounds other than those offered by the district court. *Id.* The moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If this burden is met, then the nonmoving party must set forth specific facts showing a genuine issue for trial remains. FED. R. CIV. P. 56(e).

A. Malicious Prosecution

We affirm the district court's order granting summary judgment on Izen's claim of malicious prosecution, though on different grounds. In this circuit, plaintiffs no longer allege a constitutional violation by satisfying the state law elements of malicious prosecution alone. *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (en banc), *cert. denied* 160 L. Ed. 2d 10, 125 S. Ct. 33 (2004).[3] Because Izen's complaint does not state a

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[3] Though the claim in *Castellano* was brought under § 1983 while Izen invokes *Bivens*, we have held that the constitutional torts authorized by each are coextensive. *Evans v. Ball*, 168 F.3d 856, 863 n.10 (5th Cir. 1999) ("A *Bivens* action is analogous to an action under § 1983—the only difference being that § 1983 applies to constitutional violations by state, rather (...continued)

claim under the Fourth Amendment directly, the district court properly granted the agents' motion for summary judgment.[4]

B. Federal Tort Claims Act

Izen's second amended complaint alleges claims under the Federal Tort Claims Act based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress, and negligence. The district court held that each of these claims failed for lack of exhaustion under 28 U.S.C. § 2675. Section 2675 provides that a would-be plaintiff must first present his claim to the appropriate federal agency. While Izen did so, the district court held that the scope of the claims stated in his second amended complaint went far beyond his administrative complaint. Because Izen has not contested this holding, we affirm.

C. First Amendment Retaliation

The Retaliation Standard

Izen alleges that Catalina launched the sting operation and prosecuted him in retaliation for his history of representing criminal tax defendants. "The First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms." *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999).[5] Subjecting an attorney to criminal

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than federal, officials."), *overruled on other grounds by Castellano*, 352 F.3d at 948-49 & n.36. Thus, we do not distinguish here between *Bivens* claims and § 1983 claims.

[4] Further, the record does not support a claim directly under the Fourth Amendment, rendering remand fruitless.

[5] *See also Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) ("'Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith (...continued)

investigation and prosecution with the substantial motivation of dissuading him from associating with and representing clients opposing the IRS would violate the First Amendment.

In the criminal prosecution context, plaintiffs must establish three elements in order to make out a retaliation claim. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Plaintiffs must show that "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Id.* This court further requires plaintiffs in the prosecution context to establish each of the common law malicious prosecution elements in addition to those three derived from the First Amendment. *Id.* at 260; *see also Johnson v. La. Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994) (same).[6] "One of these standards is an absence of probable cause to prosecute." *Keenan*, 290 F.3d at 257; *see also Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) ("An individual does not have a right under the First Amendment to be free from a criminal prosecution

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investigation, and legal harassment, constitutes an infringement of that freedom.'") (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)).

[6] To this end, Izen's assertion that *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979) controls is incorrect. That case involved an attempt to enjoin a criminal prosecution brought with retaliatory intent. *See Id.* at 1387. Because the criminal proceedings in *Wilson* had not yet terminated, plaintiffs could not be required to prove the elements of malicious prosecution, which includes among its elements proof that the criminal action was terminated in plaintiffs' favor (*see Keenan*, 290 F.3d at 257).

supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government."). For purposes of malicious prosecution, probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999) (quoting *Moore v. McDonald*, 30 F.3d 616, 620 n.2 (5th Cir. 1994)).[7]

The district court applied the *Johnson* standard and granted summary judgment on behalf of the agents, reasoning in part that Izen had not established the common law elements of malicious prosecution. *Izen v. Catalina*, 251 F. Supp. 2d 1327, 1340-41 (S.D. Tex. 2002). In particular, the court held that Izen had not raised an issue of material fact as to whether the agents lacked probable cause to prosecute. A court determines whether probable cause existed as of the time the government

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[7] This standard, which we share with the Second, Third, Eighth, and Eleventh Circuits, differs from that used in the Sixth, Seventh, Tenth, and D.C. Circuits. *See Moore v. Hartman*, 388 F.3d 871, 879 (D.C. Cir. 2004) (discussing the circuit split and that circuit's standard, which does not include the requirement that a plaintiff prove a lack of probable cause to succeed in a retaliatory prosecution claim); *compare Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) (requiring a plaintiff to prove the absence of probable cause to go forward on a retaliatory prosecution claim); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 796-97 (3d Cir. 2000) (same); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (same); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998) (same) *with Greene v. Barber*, 310 F.3d 889, 897-98 (6th Cir. 2002) (refusing to require proof of lack of probable cause for a retaliatory prosecution claim); *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2002) (same); *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1257 (D.C. Cir. 1987) (same).

instituted criminal proceedings. *Gordy v. Burns*, 294 F.3d 722, 728, *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d at 948-49. Although Catalina's initial information about Izen came from a potentially unreliable informant, Catalina received verifiable, independent information concerning Izen's questionable activities that amounted to probable cause before seeking an indictment.

In 1989, the IRS learned the following about Izen from the informant: (1) Izen was personally involved in the failure of the Chilton Private Bank in Chilton, Texas; (2) Izen was closely tied to Robert Chappell, the founder of NLIC, a tax shelter operating out of the Bahamas; (3) Izen engineered large transfers of money from Chilton Private Bank to offshore banks before the Chilton Private Bank failed; and (4) Izen had deposited $ 4-5 million dollars in the Isle of Man. R. 798. Additionally, the IRS learned the Izen had a great deal of knowledge about offshore banking and the working of NLIC, and he had a "close personal relationship" with Robert Chappell. R. 797. This information, coupled with Izen's failure to file tax returns for the years 1986, 1987, and 1988, led Catalina to conclude that opening a criminal investigation into Izen's affairs was warranted. The Chief Criminal Investigation officer approved this investigation. No charges were filed at this time.

Initial inquiries, including a deposition given by Izen, indicated irregularities with Izen's financial transactions for the 1985 tax year (in which he did file a tax return). Catalina, however, concedes that he was not aware that Izen eventually filed tax returns for the missing years. The returns were filed in September of 1989, after the investigation was officially opened. In any event, after Catalina's initial review of the documents indicated suspicious activity, and in light of the procedural benefits (mainly the ability to enforce summonses) afforded by a

grand jury, Catalina requested a grand jury investigation.[8] The Department of Justice approved this request. Catalina thought an undercover operation would assist in the case. Catalina's supervisor approved the operation. In early 1990, Catalina began to corroborate some of the information provided by the initial informant. Catalina learned independently that: (1) Izen had been representing NLIC since 1983; (2) the president and founder of NLIC, Robert Chappell, was a fugitive from a mail fraud conviction; (3) Chappell and his organization attracted numerous "anti-government" individuals; (4) several fugitives were apparently living and working with Chappell in the Bahamas; (5) two of the fugitives, both of whom were considered armed and dangerous, fled the country on tax charges, and were believed to be in charge of NLIC's foreign operations; (6) another NLIC executive was a fugitive on state income tax evasion charges in California; (7) NLIC used Chilton Private Bank in Chilton, Texas for some transactions; and (8) there had been over one hundred cases and thirty-one convictions numbered on taxpayers involved with NLIC. R. 791. Catalina verified an employment contract between Izen and NLIC, and that two Houston residents used Izen's office address for their Cayman Island bank accounts. Furthermore, Catalina learned that Izen: (1) attempted to establish offshore banks on numerous occasions; (2) visited several tax haven countries; (3) agreed to set up a foreign trust; (4) had a bank account in the Bahamas that he did not declare in his 1985 tax return.

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[8] This use of a grand jury for investigative purposes is distinguished from a prosecutor's use of a grand jury to seek an indictment. *See generally* Sara Sun Beale et al., Grand Jury Law and Practice § 1.7 (2d ed. 1997). Catalina was not required to have probable cause to indict Izen when he requested the grand jury investigation.

Additionally, the undercover operation gleaned more information about potential money laundering. For example, one suspect explained that Chilton Private Bank could be used to launder money. When, acting undercover, Climer contacted Izen and asked him to set up an offshore trust, he offered to do so. Izen also helped Climer launder the money by establishing offshore accounts and foreign trusts, and using tax haven country banks. Izen violated domestic tax law through these actions. Izen also disobeyed other American law requirements, such as failing to file a Form 8300 after receiving a $ 15,000 cash payment from Climer.

All of this evidence, taken in its entirety, demonstrates probable cause as a matter of law. By the time the government presented information to the grand jury, it had significant, independently verifiable information that Izen was in fact guilty of money laundering. Even assuming arguendo that Izen could create a triable issue of fact as to the remaining elements of the retaliatory prosecution claim, because he is unable to create a triable issue of fact as to whether probable cause existed when he was indicted, the district court thus properly granted summary judgment to Catalina on the retaliation claim.[9]

III.

For the foregoing reasons, we AFFIRM the district court's order granting summary judgment to the defendants as to all claims.

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[9] We therefore need not reach the qualified immunity issue raised by Catalina.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21182

JOE ALFRED IZEN, JR.; KAREN SUTER IZEN,
Plaintiffs - Appellants,

VERSUS

TERRANCE CATALINA, Special Agent, Individually;
JAMES CLIMER, Special Agent, Individually;
UNITED STATES OF AMERICA,
Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas

August 23, 2004

Before JONES, MAGILL,* and SMITH, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Joe Alfred Izen, Jr., a Texas attorney, appeals the district court's order granting summary judgment in favor of IRS agents Terrance Catalina and James Climer. Izen's Bivens action alleges that Catalina and Climer engaged in malicious prosecution and retaliation in violation of the Fourth and First Amendments, respectively, when they investigated and prosecuted him for money laundering. The district

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court, acting on remand from this court in *Izen v. Catalina*, 256 F.3d 324 (5th Cir. 2001) ("Izen I"), granted summary judgment in favor of the agents on Izen's Fourth Amendment malicious prosecution claim on the ground that Izen did not meet the common law elements of that tort. It granted the agents' motion for summary judgment on Izen's First Amendment retaliation claim for the same reason, and held in addition that Izen had not raised a genuine issue of material fact as to the agents' retaliatory motive. The court also granted the United States' motion for summary judgment on Izen's Federal Tort Claims Act claims of malicious prosecution, false arrest, intentional infliction of emotional distress, and negligence. Izen appeals.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's grant of summary judgment on all of Izen's claims other than his claim against Catalina for retaliation; As to that claim we reverse and remand.

I.

Izen is a tax attorney. He has long represented tax protestors and other defendants in criminal tax cases. In August 1989, IRS agent Catalina received a referral from the Waco, Texas IRS collection office alleging that Izen had not filed income tax returns for tax years 1986, 1987, and 1988. The referral contained allegations from a third party informant that Izen was involved in money laundering, including allegations that Izen was involved in the failure of a private bank and had accounts in foreign countries. Catalina soon deemed the informant unreliable. Izen alleges the informant was Michael J.B. Easton, who had an indictment pending against him at the time and, according to Izen, aided Izen's ex-wife in surreptitiously withdrawing a large sum of money from an account of Izen's.

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[1] Izen placed in the record those portions of the recordings which he argues are exculpatory.

[2] Only a small fraction of Catalina's grand jury testimony is in the record. Because of Izen's allegations, the district court did not rely on the indictment.

On remand, Izen filed a second amended complaint in which he added a Federal Tort Claims Act cause of action against the United States. The district court again granted summary judgment in favor of the agents and United States on all claims. Izen appeals the grant of summary judgment on his malicious prosecution claim, his retaliation claim, and his Federal Tort Claims Act cause of action.

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This court reviews a grant of summary judgment de novo. *Chriceol v. Phillips*, 169 F.3d 313, 315 (5th Cir. 1999). We may affirm a grant of summary judgment on grounds other than those offered by the district court. *Id.* The moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If this burden is met, then the nonmoving party must set forth specific facts showing a genuine issue for trial remains. Fed. R. Civ. P. 56(e).

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[3] Though the claim in *Castellano* was brought under § 1983 while Izen invokes *Bivens*, we have held that the constitutional torts authorized by each are coextensive. *Evans v. Ball*, 168 F.3d 856, 863 n.10 (5th Cir. 1999), *overruled on other grounds by Castellano*, 352 F.3d 939 ("A *Bivens* action is analogous to an action under § 1983--the only difference being that § 1983 applies to constitutional violations by state, rather than federal, (...continued)

a claim under the Fourth Amendment directly, the district court properly granted the agents' motion for summary judgment.[4]

B. Federal Tort Claims Act

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C. First Amendment Retaliation

1. The Retaliation Standard

Izen alleges that Catalina launched the sting operation and prosecuted him in retaliation for his history of representing criminal tax defendants. "The First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms." *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999).[5] Subjecting an attorney to criminal

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officials."). Thus we do not distinguish here between *Bivens* claims and § 1983 claims.

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investigation and prosecution with the substantial motivation of dissuading him from associating with and representing clients opposing the IRS would violate the First Amendment.

In the criminal prosecution context, plaintiffs must establish three elements in order to make out a retaliation claim. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Plaintiffs must show that "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Id.* As the *Keenan* court noted, this is the law of other circuits as well. *Id.* (citing cases from the Eighth, Tenth, and Sixth Circuits). This court requires plaintiffs in the prosecution context to establish each of the common law malicious prosecution elements in addition to those three derived from the First Amendment. *Id.* at 260; *see also Johnson v. La. Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994) (same).

The district court applied the Johnson standard and granted summary judgment on behalf of the agents, reasoning in part that Izen had not established the common law elements of malicious prosecution. *Izen v. Catalina*, 251 F. Supp. 2d 1327, 1340-41 (S.D. Tex. 2002). In particular, the court held that Izen had not raised an issue of material fact as to whether the agents lacked probable cause to prosecute.

It is true, as the district court noted, that the government need not have even reasonable suspicion to

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infringement of that freedom.'") (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)).

undertake an investigation. *United States v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991). However, this is beside the point. Izen's claim, properly understood, is not that Catalina violated the First Amendment by undertaking an investigation without reasonable suspicion, but rather that he violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against Izen for his advocacy on behalf of unpopular criminal tax defendants. *Allibhai*'s holding that the government need not have reasonable suspicion in order to investigate does not entail the proposition that the government may investigate with the motive of retaliating against its target for engaging in constitutionally protected conduct.[6] It is well established that "'an act taken in retaliation for the exercise of a constitutionally protected right is actionable . . . even if the act, when taken for a different reason, would have been proper.'"[7]

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[6] Under the district court's reasoning, the government could choose its targets based in large part on their race, religion, or political affiliation as well. We reject the notion that *Allibhai* leads to this conclusion. *See Anderson v. Davila*, 37 V.I. 496, 125 F.3d 148, 160-61 (3d Cir. 1997) (holding that the government's motive in setting up surveillance of a suspect is relevant to a retaliation claim).

[7] *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002) (quoting *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998)); *Morfin v. City of E. Chicago*, 349 F.3d 989, 1005 (7th Cir. 2003) (same); *Poole v. County of Otero*, 271 F.3d 955, 961; *Cody v. Weber*, 256 F.3d 764, 771 (8th Cir. 2001) (same); *cf. Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977) (holding that even though a teacher "could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms").

2. Evidence of Retaliation

As an alternative reason for granting summary judgment in favor of the agents, the district court held that Izen had failed to meet his burden of raising an issue of material fact as to whether Catalina's decision to investigate and prosecute him was substantially motivated by Izen's representation of criminal tax defendants. 251 F. Supp. 2d at 1342. We disagree.

In *Izen I*, we explicitly held that "based on the record and the briefs, there is a genuine issue of material fact as to the reasons Izen was investigated and prosecuted and therefore we vacate the grant of summary judgment as to Izen's retaliatory prosecution claim." 256 F.3d at 329. The district court avoided our mandate by reasoning that it was limited to the record then before us, which the district court had since allowed the agents to augment. 251 F. Supp. 2d at 1343.

There is an exception to the law of the case doctrine where evidence at a subsequent trial is substantially different than that on the record before the court of appeals. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002), *cert. denied*, 538 U.S. 938, 155 L. Ed. 2d 341, 123 S. Ct. 1604 (2003). A district court may hear additional evidence on remand only if our mandate does not foreclose the issue. *United States v. Becerra*, 155 F.3d 740, 754 (5th Cir. 1998). Here, while we did not direct the district court to consider additional evidence, our mandate did not foreclose it. However, we cannot agree with the district court that "Izen completely fails to present any evidence, direct or circumstantial, that Catalina or Climer had any retaliatory motivation against him." 251 F. Supp. 2d at 1342. Because in *Izen I* we held that there was a genuine issue of material fact as to the agents' motivation, we need only consider whether the evidence offered in the interim has negated this holding.

Far from negating a genuine issue of material fact as to Catalina's motivation, the evidence adduced on remand provides further support for Izen's position. The evidence now in the record provides proof that Catalina was well aware of Izen's representation of criminal tax defendants. A Criminal Investigation Case Analysis Guide bearing Catalina's name and dated 10/17/89 contains the following statements: "The subject of the [money laundering] investigation is an attorney who specializes in representing tax protestors. . . . The taxpayer has represented several protestors in the Houston area and all across the country. He is very well known in the protest movement." R. at 771.

Catalina's Request for Undercover Operation form also prominently notes Izen's association with tax protestors, and mentions a case in which Izen successfully opposed the IRS: "Izen is very well known throughout the country. He has represented tax protestors from the East coast to the West coast. Izen represented Dahlstrom before the Ninth Circuit. Dahlstroms's conviction was reversed. The case had to do with a foreign trust scheme devised to create sham tax deductions." R. at 732. Despite the fact that much of the information Catalina relates about Izen pertains to his representation of clients in his professional capacity, Catalina concludes that "Izen's actions demonstrate that he has very little regard for the tax laws and is predisposed to launder money." R. at 731.

Moreover, a Statistics and Case Summary Report dated December 11, 1989, and allegedly drafted by Catalina's supervisor commences with the following under the heading of "Allegations": "Izen is a well known tax protestor attorney in the Houston area. He files personal returns on an irregular basis, and they are always filed late. He was head of the legal dept. for Nassau Life Insurance, a tax shelter in the Bahama Islands. He had close ties to the Center for Independence for Judges and Lawyers . . . ." R. at 756.

In addition to those reports bearing Catalina's name, reports that Catalina claims to have considered in deciding to prosecute Izen also strengthen his retaliation claim. One of the primary sources of information Catalina relied on was a 1986 Summary Report regarding NLIC, Izen's client. R. at 670. However, nothing in the report connects Izen to money laundering. Instead, the report details a tax shelter devised by the former President of NLIC, Robert S. Chappell, a fugitive on an Indiana mail fraud conviction living in the Bahamas.

The report contains a section entitled "PROTEST GROUP AFFILIATIONS," in which it is alleged that:

> Chappell and his organization have attracted a number of fugitives and individuals who are anti-government, anti-black, anti-Jew, etc. The business has been increasing since joining forces with these extremist groups. The seminars at Rock Sound Club are attended, promoted, and taught by the right wing Klu Klux Klan affiliates.
>
> Several fugitives are allegedly living in the Bahamas and working with Chappell. These fugitives include tax protestors involved with militant groups such as the Posse Comitatus, Patriot Network, and Center for Independence of Judges and Lawyers.

R. at 666. Numerous individuals are listed as somehow affiliated with Chappell, though it is striking that none is accused in the report of laundering money. The sole mention of Izen is as follows: "Izen is an attorney out of Houston, Texas. He issued tax opinions for Nassau Life. According to intelligence that we have acquired, Izen has been representing Nassau Life since June 1983. IRS discontinued an investigation of Izen in April 1984." R. at 661.

Thus both the reports prepared by Catalina and those he reviewed prominently refer to Izen's associations with unpopular targets of the IRS, but contain scant, if any, evidence of money laundering, the purported purpose of the investigation. Catalina and Climer later gathered evidence in their sting operation which they claim supports their defense that Izen was not investigated and prosecuted in retaliation for his protected activities, but rather for his apparent willingness to engage in suspect transactions.

However, analyzed under the third element of *Keenan* and set against the evidence above, we cannot agree that Izen has failed to raise a genuine issue of material fact as to retaliatory motive. A reasonable trier of fact could determine that retaliation was a substantial motivation for Catalina's investigation and prosecution of Izen.

Although we reverse the district court's grant of summary judgment as to Catalina, we affirm its grant of summary judgment as to Climer. All of the evidence pertaining to the agents' motive relates to Catalina, not Climer. In order to maintain a claim against Climer, Izen must establish that Climer caused him to suffer an injury that would chill a person of ordinary firmness from continuing to represent tax defendants, and that Climer was substantially motivated by Izen's representation.

Izen has shown neither. He has pointed to no evidence that Climer caused the alleged constitutional violation; nor does he point to evidence of retaliatory motive harbored by Climer.

3. Qualified Immunity

The district court offered alternative reasons for holding that Catalina is entitled to qualified immunity. In our qualified immunity analysis, we must "first determine whether the challenged conduct, viewed in the light most favorable to the plaintiff, would actually amount to a violation of federal law in the first place." *Kinney v.*

Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (en banc). The district court reasoned that because Izen could not prove his retaliation claim, he could not make the necessary showing of a constitutional violation. 251 F. Supp. 2d at 1343. Our position on retaliation requires us to reverse this holding as well.

Taking Izen's allegations as true, he alleges a violation of the First Amendment. The second prong of qualified immunity analysis requires us to determine whether the agent's conduct violated clearly established federal law. *Kinney*, 367 F.3d at 350. It has long been the law of this circuit that government officials violate the First Amendment by undertaking a prosecution "in retaliation for or to deter the exercise of constitutionally protected rights." *Wilson v. Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979). If substantially motivated by a desire to retaliate against Izen for his association with and representation of tax defendants (an issue we are remanding for a fact finder to determine), Catalina's actions were not objectively reasonable. A reasonable agent would not have believed it permissible to investigate and prosecute an attorney in order to discourage him from opposing the IRS.

III.

For the foregoing reasons, we AFFIRM the district court's order granting summary judgment as to all of Izen's claims other than his claim of First Amendment retaliation on the part of agent Catalina. As to that issue, we REVERSE and REMAND for further appropriate proceedings.

JOE ALFRED IZEN, JR., Plaintiff,

v.

TERRANCE CATALINA, et al., Defendants.

CIVIL ACTION NO. H-97-1568

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

This Bivens action is before the Court on Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment After Remand [Doc. # 77] and the United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 93] (collectively "Defendants' Motions"). The matter has been fully briefed and is ripe for determination.[1] Having considered the parties' submissions, all matters of record, and applicable legal authorities, the Court concludes that Defendants' Motions should be granted.

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[1] *See* Defendants' Supplement to Motion to Dismiss or for Summary Judgment After Remand [Doc. # 80]; Plaintiffs' Response to Motion to Dismiss or for Summary Judgment After Remand and Supplement [Doc. # 85]; Affidavit of Joe Alfred Izen, Jr. in Opposition to Defendants' Motion to Dismiss or For Summary Judgment After Remand ("Izen's Affidavit") [Doc. # 84]; Reply by Defendants to Response to Motion to Dismiss or for Summary Judgment After Remand [Doc. # 86]; Plaintiffs' Supplemental Briefing on Malicious Prosecution and First Amendment Retaliation Claims [Doc. # 94]; Defendants' Response to Supplemental Briefing on Malicious Prosecution and First Amendment Retaliation Claims [Doc. # 96]; Plaintiffs' Response to United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 101]; Defendants' Reply to Plaintiffs' Response to United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 104].

I. FACTUAL AND PROCEDURAL BACKGROUND

At all times relevant to this matter, Defendants Terry Catalina and Jim Climer were agents with the Criminal Investigation Division ("CID") of the Internal Revenue Service ("IRS"). Plaintiff Joe Alfred Izen, Jr. is a lawyer who lives in Bellaire, Texas and Plaintiff Karen Suter Izen is his wife. In August 1989, Catalina received a referral from the Waco, Texas IRS collection office alleging that Izen had not filed his 1986, 1987, and 1988 income tax returns and had not paid income taxes for those years. The referral contains allegations from a third-party informant that Izen was involved in money laundering, including allegations, among others, that Izen was personally involved in the failure of a private bank in Texas and held large sums of money in accounts in the Isle of Man. The referral also references Izen's deposition in divorce proceedings, in which he disclosed personal knowledge regarding a Bahamian tax shelter and its owner. Catalina, who knew nothing of Izen prior to receiving the referral, on October 16, 1989 accepted the referral for investigation of the charge of failure to file tax returns, but determined there was insufficient basis to begin a money laundering investigation at that time. Catalina explains that it was IRS policy to investigate individuals who had not filed tax returns but had an obligation to do so. Catalina thus believed he was following IRS policy when he recommended opening a criminal income tax investigation on Izen for the years 1986-88. Catalina and his supervisor also recommended including 1985 in the investigation, although a return had been filed.

Catalina recommended to the Department of Justice that the investigation be conducted through a grand jury. The United States Attorney was authorized to undertake a grand jury investigation in December 1989.

Meanwhile, Izen filed his 1986 return in September 1989, after Catalina received the referral from the Waco

office, but Catalina states that he was unaware of that fact. Izen did not file his 1987 and 1988 returns until April, 1990. Izen received refunds for the 1987 and 1988 tax years in June, 1990.

In April 1990, Catalina reviewed various investigative reports on Nassau Life Insurance Company Limited ("NLIC"), a company with which Izen had an employment contract for full-time work in 1985, and persons and banks related to or doing business with that entity. Catalina also reviewed various people's tax records, off-shore bank records, and other information on fugitives fleeing federal and state criminal convictions or charges. Catalina then decided to expand the investigation to include an undercover investigation of Izen's possible involvement in money laundering. Climer was the undercover agent assigned to the investigation. Climer posed as a client seeking to create a foreign trust in which to deposit proceeds of the sale of stolen oil. The investigation continued from April 1990 until January 1992. Climer tape recorded numerous conversations he had with Izen during the undercover investigation.

Catalina testified before the grand jury in May 1995. The grand jury returned a four-count indictment against Izen for conspiracy to commit money laundering and aiding and abetting or attempting money laundering.[2] Izen was not indicted for tax evasion. In May 1996, the United States moved to withdraw the presentment of the indictment and all criminal charges against Izen were dismissed.

Izen commenced this case on May 5, 1997, alleging various constitutional and non-constitutional torts. The

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[2] *See* Indictment, attached to Defendants Catalina's and Climer's Motion to Dismiss, or for Summary Judgment on Plaintiff's First Amended Complaint [Doc. # 43].

matter was referred to Magistrate Judge Calvin Botley. Based on Judge Botley's Memorandum and Recommendations, the Court dismissed all of Izen's claims.[3] Izen appealed the dismissal of his malicious prosecution, Fifth Amendment, and retaliatory prosecution claims, the denial of his motion for disclosure of grand jury materials, and the summary judgment in favor of Defendants on their qualified immunity defense.

The Fifth Circuit affirmed the dismissal of the Fifth Amendment claim, but reversed the dismissal of the malicious prosecution and retaliatory prosecution claims and remanded the matter to this Court for further proceedings consistent with its opinion.[4] *See Izen v Catalina*, 256 F.3d 324 (5th Cir. 2001).

After remand, the Court granted Izen leave to file a Second Amended Complaint to join his wife, Karen Suter Izen, as a Plaintiff and to add a Federal Tort Claims Act cause of action against the United States. Plaintiffs' Second Amended Complaint alleges the following causes of action: (1) Fourth Amendment malicious prosecution; (2) retaliatory prosecution proscribed by the First Amendment; (3) disparagement in violation of the First Amendment; (4) selective prosecution in violation of the

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[3] The Court dismissed Izen's Federal Tort Claims Act cause of action against the United States in February 1999 on the grounds that he had not exhausted his administrative remedies as required by 28 U.S.C. § 2675. *See* Memorandum and Order entered February 24, 1999 [Doc. # 36]. Judge Botley subsequently denied Izen leave to amend his Complaint to reassert a FTCA claim and join his wife as a Plaintiff. *See* Order entered April 19, 1999 [Doc. # 45]. The Court dismissed the remaining claims in its Memorandum and Order entered September 28, 1999 [Doc. # 62].

[4] The Fifth Circuit also affirmed the denial of Izen's motion for grand jury materials. *Izen*, 256 F.3d at 329-30.

First Amendment;[5] (5) interference with liberty interests in violation of the Fifth Amendment; and (6) Federal Tort Claims Act claim based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress and negligence. Plaintiffs' third and fourth causes of action were dismissed by the Court prior to Izen's appeal. These rulings were not appealed, and they became final. Izen appealed the dismissal of Plaintiff's fifth cause of action, and the Fifth Circuit affirmed the district court in that respect. Thus, only Plaintiffs' malicious prosecution, retaliatory prosecution, and newly added Federal Tort Claims Act causes of action are currently before the Court.[6] The Court discusses additional facts below as necessary to its analysis of these claims.

II. SUMMARY JUDGMENT STANDARD

Defendants have styled their motions as Motions to Dismiss or for Summary Judgment. Thus, Plaintiffs were given notice in the original motions that Defendants were seeking summary judgment. In addition, this Court's Order issued September 9, 2002 [Doc. # 105] expressly gave Plaintiffs notice that the Court would treat the

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[5] Although labeled as a First Amendment claim, Plaintiff asserts that he was treated differently than other similarly situated individuals. This type of selective prosecution claim implicates ordinary equal protection standards. *See United States v. Jones*, 287 F.3d 325, 333 (5th Cir. 2002) ("The requirements for a selective prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose."); *see Bryan v. City of Madison*, 213 F.3d 267, 277 and n.18 (5th Cir. 2001) (selective prosecution is a type of equal protection claim recognized in this circuit).

[6] The parties have not briefed any other purported causes of action.

pending motions as motions for summary judgment. Plaintiffs have had ample opportunity to present evidence in response to Defendants' Motions, and have done so. The Court will consider Defendants' Motions under the standards governing summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure.

Rule 56 of the Federal Rules of Civil Procedure mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Baton Rouge Oil and Chemical Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir. 2002). An issue is material if its resolution could affect the outcome of the action. *Terrebonne Parish School Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). In deciding whether a fact issue has been created, the facts and the inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party. *Hotard v. State Farm Fire and Cas. Co.*, 286 F.3d 814, 817 (5th Cir. 2002). However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy -- that is, when both parties have

submitted evidence of contradictory facts." *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. The movant meets this initial burden by showing that the "evidence in the record would not permit the nonmovant to carry its burden of proof at trial." *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998). If the movant meets this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001).

The nonmovant's burden is not met by mere reliance on the allegations or denials in the nonmovant's pleadings. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). Likewise, "unsubstantiated or conclusory assertions that a fact issue exists" do not meet this burden. *Id.* Instead, the nonmoving party must present specific facts which show "the existence of a 'genuine' issue concerning every essential component of its case." *Id.* A dispute about a material fact is genuine only if evidence is such that a reasonable jury could return a verdict for nonmoving party. *Littlefield*, 268 F.3d at 282. In the absence of any proof, the court will not assume that the nonmovant could or would prove the necessary facts. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *revised on other grounds upon denial of reh'g*, 70 F.3d 26 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)).

III. ANALYSIS

A. § 1983 Malicious Prosecution

Izen asserts a cause of action for malicious prosecution in violation of the Fourth Amendment. The Fifth Circuit has identified the following as elements of a malicious prosecution cause of action:

(a) a criminal action was commenced against plaintiff;

(b) the prosecution was caused by defendant(s);

(c) the criminal action terminated in plaintiff's favor;

(d) plaintiff was innocent;

(e) defendant(s) acted without probable cause;

(f) defendant(s) acted with malice; and

(g) the prosecution damaged plaintiff.

Izen, 256 F.3d at 328 (citing *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994)). This Court's initial dismissal of Izen's malicious prosecution claim was based solely on the Magistrate Judge's recommendation that the criminal action, in which the government voluntarily dismissed the charges against Izen before trial, did not as a matter of law terminate in Izen's "favor." The Fifth Circuit reversed that holding, and remanded this case "for consideration of whether the defendants had probable cause and acted with malice when prosecuting Izen." 256 F.3d at 328-29. In its opinion, the Fifth Circuit did not address any element of the cause of action other than whether the prosecution was terminated in plaintiff's favor.

Since deciding Izen, the Fifth Circuit has revisited the standards governing § 1983 malicious prosecution claims, stating: "It would be an understatement to say that this circuit's case law regarding so-called 'Fourth Amendment malicious prosecution' claims under § 1983 is both confused and confusing." *Gordy v. Burns*, 294 F.3d

722, 725 (5th Cir. 2002). The *Gordy* opinion notes that in most circuits, a § 1983 plaintiff who alleges malicious prosecution must prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to certain elements of the common law tort of malicious prosecution. *Id.* at 726. "But in the Fifth Circuit, a plaintiff in a § 1983 malicious prosecution action need establish only the elements of common-law malicious prosecution. This circuit repeatedly has indicated -- without explanation -- that courts must look to the elements of a malicious prosecution claim under the law of the state where the offense was committed." *Id.* The Fifth Circuit concluded that while state law determines the elements of the claim, federal law determines the scope and meaning of those elements.[7] *Id.* at 726-27. The crux of this case, as it was in *Gordy*, is whether there was probable cause for the criminal proceedings against the plaintiff. In *Gordy*, the Fifth Circuit explained the probable cause inquiry in the context of a malicious prosecution claim:

> For purposes of malicious prosecution, probable cause means 'the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

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[7] The Fifth Circuit expressed some dissatisfaction with this approach, noting that if the events had taken place in Texas, the plaintiff would have to prove that he was actually innocent of the charges, an element not required under Louisiana law. 294 F.3d at 727. The court observed: "if malicious prosecution is in some sense a federal constitutional tort, the outcome of the case should not hinge on how a state defines and shapes the elements of a tort claim." *Id.*

Id. at 728 (citing *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999)). The Court further explained that "prosecutor" refers to any person who initiates or procures a criminal proceeding, and that obtaining an indictment will not insulate state actors from a malicious prosecution claim if a grand jury's decision "has been tainted by the malicious actions of the government officials."[8] *Id.*

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[8] Defendants argue that the indictment by the grand jury proves probable cause as a matter of law. *See* Defendants' Motion, at 14-15 (citing *Rodriguez v. Ritchey*, 556 F.2d 1185, 1191 (5th Cir. 1977) (en banc), and *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.), *cert. denied*, 459 U.S. 1005, 74 L. Ed. 2d 397, 103 S. Ct. 361 (1982)). Izen contends that Defendants are not shielded from liability by the grand jury indictment because Catalina misled the grand jury into believing the Izen had not paid his taxes for 1986, 1987, and 1988. *See* Plaintiffs' Response, at 5-7. Izen's characterization of Catalina's grand jury testimony is dubious at best. The testimony relied upon by Izen is as follows:

Foreman: You targeted Izen, I believe you said at the beginning, because he had not paid taxes in '86, '87 and '88?

[Catalina]: We had a referral from our Collection Division, yes, that indicated that

Foreman: --that he had not filed his income tax returns for three years?

[Catalina]: That's correct, uh-huh.

Foreman: So, I mean, that would have had to be the reason that you targeted him, --

[Catalina]: That's right.

Foreman: --and that's the reason you targeted -- you set up this string operation because, I assume, you probably suspected that maybe he had done some illegal activities in the past. You don't know that --

[Catalina]: Well, that's a good question. Well, now, he's legal counsel for a convicted felon who's helping other people commit (...continued)

Under *Gordy*, the Court probable cause inquiry is "whether a reasonable officer would believe to a 'fair probability' that a crime had been committed." *Id.* "The probable cause analysis only requires that [the Court]

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crimes. So, we did make some -- we had some beliefs there that he would be willing to do something like this.

Member: Why not get him on income tax evasion?

[Catalina]: Well, we could have.

Member: To me that would seem more logical.

[Catalina]: We probably could have, but I suspect we would have had trouble with getting the information from the clients and things. It may have been tougher--

Member: There's several hundred thousand attorneys that have ex-felons as

[Catalina]: No, no, no. He's representing -- he's legal counsel as far as trusts and things. I mean, he's not representing them necessarily in litigation. He's not representing them in a litigating-type situation here. When it has to do with the Nassau Life, he's saying, you know, these trusts are legal, they are valid. He is writing legal opinions that people are relying on to, in turn, use these trusts. I'm not saying because someone represents someone who is a criminal, that that makes them bad, no. But he's allowing this business to go on by the fact that he's associated with it.

Grand Jury Testimony of Catalina, May 3, 1995, at 72-73 (Exhibit A to Izen's Affidavit in response to Defendants' motion to dismiss or for summary judgment before remand [Doc. # 54]). There is nothing false or misleading about this testimony. Although Izen eventually paid his taxes, he had not done so at the time the investigation was begun, and he did not do so on time. Defendant's failure to clarify that Izen paid his 1986, 1987, and 1988 taxes did not impact materially on the grand jury's decision to indict him for money laundering. Nevertheless, the Court does not base its decision on this point. As explained in the text, the record establishes that there was probable cause to believe that Izen had aided in the commission or conspired to commit money laundering.

find a basis for an officer to believe to a 'fair probability' that a violation occurred." 294 F.3d at 729. This analysis is conducted as of the time when criminal proceedings were instituted, i.e., when criminal charges are actually filed, and based solely on the facts as the officers honestly and reasonably believed them to be at the time they institute the proceedings. The inquiry does not require a showing that the officer's belief was correct, nor that it was more likely true than false. 294 F.3d at 729.

Izen was indicted for aiding and abetting money laundering and conspiracy to launder money.[9] The crime of money laundering requires proof of the following:

(1) that the defendant knowingly conducted or attempted to conduct a financial transaction;

(2) that the financial transaction involved the proceeds, or property represented to be the proceeds, of a specified unlawful activity;

(3) that the defendant knew the property involved in the financial transaction represented the proceeds of some form of unlawful activity; and

(4) that the defendant either intended to promote the carrying on of the specified unlawful activity or knew that the transaction was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds.[10]

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[9] The IRS criminal investigation ultimately led to the investigation of another individual, Reinhold Sommerstedt, who was indicted for conspiring with Izen to launder money. Sommerstedt is not, and has never been, a party to this civil action.

[10] *See* Fifth Circuit Pattern Jury Instructions, Laundering of Monetary Instruments (18 U.S.C. § § 1956(a)(1)(A)(I), 1956(a)(1)(B)(I), 1956(a)(3)(A), and 1956(a)(3)(B)); *United States v. Rivera*, 295 F.3d 461, 467 (5th Cir. 2002).

The Fifth Circuit summarized the essence of the crime of money laundering in *United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir. 1995):

> The government must prove that the specific transactions in question were designed, at least in part to launder money. It is necessary to show a desire to create the appearance of legitimate wealth or otherwise to conceal the nature of funds so that it might enter the economy as legitimate funds. The purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities.

(internal citations omitted.).

In order to prove that Izen aided and abetted money laundering, the government would have had to prove that Izen "associated himself with the unlawful financial manipulations, that he participated in them as something he wished to bring about, and that he sought, by his actions, to make the effort succeed." *Rivera*, 295 F.3d at 468. To be guilty of conspiracy to launder money, *see* 18 U.S.C. § 371, the following must be shown:

(1) that the defendant and at least one other person made an agreement to commit the crime of money laundering as charged in the indictment;

(2) that the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) that one of the conspirators during the existence of the conspiracy knowingly committed at least one of the

overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

See Rivera, 295 F.3d at 468; Fifth Circuit Pattern Jury Instructions, Conspiracy (18 U.S.C. § 371).

The Court must determine whether the information known to Defendants at the time of Izen's prosecution provided a basis for Defendants to believe to a "fair probability" that Izen committed the crimes of aiding and abetting and conspiracy to commit money laundering.

1. Catalina

The evidence establishes that Catalina initially began a criminal investigation of Izen in 1989 based on Catalina's understanding that Izen had failed to file tax returns for 1986, 1987 and 1988.[11] Although Catalina was aware at the outset of allegations by an informant that Izen was involved in money laundering, Catalina recognized that the informant might not be "ethically pure," and therefore sought corroborating evidence before expanding the investigation to include money laundering or a money laundering conspiracy.[12]

Over time, Catalina obtained other information on Izen that led Catalina to believe there was a "fair probability" that Izen was involved in some way in a money laundering scheme. This information included Izen's involvement with Nassau Life Insurance Company, Ltd. ("NLIC"), a tax shelter that operated out of the

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[11] Catalina, apparently later in 1989, learned Izen in fact had filed his 1986 return, but had not filed the 1987 or 1988 returns. Still later, Catalina became aware that Izen filed these latter two returns in April 1990.

[12] Defendants have redacted the name of the informant from their evidence, but Plaintiffs contend that the informant was a man named Michael J. B. Easton. Defendants do not contest this identification.

Bahamas. Catalina reviewed, inter alia, a December 1986 Summary Report regarding NLIC[13] that stated that the founder and president of NLIC, Robert Chappell, was a fugitive on a mail fraud conviction; Chappell was living in the Bahamas and was associated with several anti-government fugitives; Chappell assisted others to create "contractual companies" and trusts which the IRS believed were merely vehicles to avoid taxes by placing taxpayers' assets outside the United States and otherwise lack economic substance; NLIC utilized the services of Chilton Private Bank in Chilton, Texas; the IRS had opened 105 cases on taxpayers having some involvement with NLIC and had obtained numerous tax crime convictions; and that Izen had been representing NLIC since 1983, and had a full-time employment contract with that entity for at least a year. *Id.* The Summary Report was prepared well before Catalina received the referral from Waco containing the informant's allegations, and appears to have been compiled from internal IRS sources. There is no indication that any of this information contained in the Summary Report came from Easton, the allegedly untrustworthy informant.

Catalina also reviewed an undated Memo to the Assistant Regional Commissioner of the IRS drafted by the acting Assistant Commissioner.[14] This Memo described schemes perpetrated by NLIC involving transferring assets to a foreign business trust organization to protect them from seizure by the IRS and involving loans created to generate phony interest deductions. *Id.* Again, there is no indication that this information came from the allegedly untrustworthy informant.

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[13] Defendants' Exhibit 48.

[14] Defendants' Exhibit 49.

Another memo reviewed by Catalina[15] indicates that a suspect interviewed during an Atlanta IRS District undercover operation related to NLIC described various schemes used by NLIC to launder money, including the use of Chilton Private Bank. The name of the informant has been redacted, but he is identified as a "Nassau Life promoter" and there is no indication that this information came from Easton. *Id.*

Catalina learned from an article in the Waco Tribune Herald published on June 9, 1987,[16] that the former Manager of the then-closed Chilton Private Bank was charged with attempting to defraud the IRS and opening a bank account using a fictitious name.[17]

Catalina learned that Izen had a March 25, 1985 employment contract to provide full-time legal services to NLIC under which Izen was to be paid a minimum of $ 300,000.[18] The employment contract states "you have pursued, and will continue to pursue the formation of a commercial bank with mutual clients and with your former clients." *Id.*

Catalina also considered suspicious several statements made by Izen himself in his August 27, 1987 divorce deposition.[19] Among these statements were admissions that Izen attempted to set up offshore banks on at least four occasions in the Isle of Man, the

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[15] Defendants' Exhibit 50.

[16] Defendants' Exhibit 51.

[17] The article also reported that the private bank had been closed and was to be liquidated after its owner, John Landa, was indicted for tax fraud and racketeering arising from other business activities.

[18] *See* Defendants' Exhibit 43.

[19] *See* Defendants' Exhibit 44.

Bahamas, the Turk & Caicos Islands or the Cayman Islands, and Guyana, and that he had traveled to the Republic of Guyana, the Turk & Caicos Islands, Saint Vincent, the Isle of Man, and the Bahamas. *Id.* In addition, the deposition reveals that Izen had a bank account in the Bahamas containing more than a hundred thousand dollars, which he did not reveal on his 1985 tax return. *Id.*[20]

Having reviewed all of the above information, Catalina (with his manager's concurrence) arranged for Izen to be contacted and asked if he would be willing to set up an offshore trust. Izen agreed. At this point, Catalina and his supervisor recommended, and obtained approval to conduct an undercover investigation of Izen. Climer (whom Catalina did not know prior to this time) was assigned to act as the undercover agent on the case. Climer posed as an investor seeking to set up a foreign trust in which to deposit the proceeds of an illegal scheme, the sale of allegedly stolen oil. Climer contacted Izen on numerous occasions. Transcripts of those conversations reveal that Climer told Izen that the funds were the proceeds of an illegal activity, i.e., the sale of stolen oil, and that Izen nonetheless agreed to set up the off-shore trust.[21] Izen advised Climer on procedures for accessing the money by way of loans from the foreign

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[20] Catalina, further, was aware that Izen's bank account in the Bahamas was essentially drained in 1986-1987. The bank statement for the account, Defendants' Exhibit 45, indicates that the account had a balance of $ 122,375.44 on May 30, 1986, $ 41,748.44 on December 18, 1986, and $ 3,739.44 on March 10, 1987. According to an internal IRS document summarizing records of a Cayman Island Bank, Defendants' Exhibit 52, two additional accounts were established at the bank by other individuals using the address of Izen's law office in Houston, Texas.

[21] *See* Izen's Affidavit, Exhibit D.

trust. Izen further advised Climer that eventually Climer would have to report income from the trust on his tax returns. When Climer stated that he would rather not list the source of the income on his tax returns as proceeds from stolen oil, Izen informed him that he could identify the source simply as "other."

This collection of information amply suffices to satisfy as a matter of law the probable cause standard. Catalina had knowledge of sufficient matters to form a belief to a "fair probability" that Izen had engaged in, assisted in, or conspired in a money laundering scheme. *See Gordy*, 294 F.3d at 728.

Izen attempts to counter the above evidence of probable cause with his own Affidavit, in which he offers purportedly innocent explanations for the conduct deemed suspicious by Catalina. Izen asserts that, contrary to Easton's allegation that Izen was involved in large transfers of funds from Chilton Private Bank to offshore banks, the only contact Izen had with Chilton Private Bank was his representation of some depositors in tax proceedings. He further claims that the only ties he had with Robert Chappell was his representation of NLIC on legal matters. Izen further points out that setting up foreign trusts, attempting to set up foreign banks, having an offshore bank account, and traveling to "tax haven" countries, are not themselves illegal activities. Izen explains that he did not report money paid into his Bahama's account on his 1985 tax return because he understood the account to be an annuity which did not need to be reported until paid out, and he claims to have reported withdrawals from the account on his 1986 and 1987 returns. Izen points out that many of the IRS's 105 cases opened on taxpayers involved with NLIC did not result in convictions, and further denies that he personally ever took part in the schemes the IRS attributes to NLIC. Izen also denies any knowledge that two taxpayers utilized his law office as the address on

their Cayman Island bank accounts. Izen attributes the late filing and payment of his 1986 tax returns to his bookkeeper absconding with his records, and claims his wife converted the funds from the Bahamas bank account for her own use.

Izen's Affidavit does not contradict any of the factual allegations relied upon by Catalina, but attempts to explain them away. Izen's after-the-fact denials are not sufficient to negate Catalina's belief that probable cause existed. Probable cause is determined on the basis of the information "honestly and reasonably" believed by the government investigators (here, Catalina) at the time of the decision to prosecute. *See Gordy*, 294 F.3d at 728.[22] Izen's evidence does not raise a genuine issue of material fact as to the existence of probable cause.

Furthermore, Izen's arguments in opposition to summary judgment are unpersuasive. Izen argues that because he told Climer that income from the trust may eventually have to be reported on his tax returns, there is no evidence Izen intended to "conceal" the funds, and therefore no evidence of the crime of money laundering. Izen's isolated self-serving comment does not negate the crime of aiding and abetting or conspiring to commit money laundering established by his taped conversations with Climer, particularly when considered in context with other documentary and circumstantial information Catalina possessed. In response to Climer's inquiries, Izen

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[22] The Court does not rely on Defendants' theory that the grand jury's indictment insulates them from liability as a matter of law. Although the record contains only those portions of the Climer transcripts that Izen has submitted as evidence, and not portions of the transcripts Defendants believe support the grand jury's vote of indictment, the limited record is sufficient to defeat Izen's contentions on summary judgment and his legal claims pleaded in the Second Amended Complaint.

described a mechanism whereby Climer could conceal and accumulate money in a foreign trust before distribution without paying taxes, with no limit on how long money could be accumulated. Climer made it clear from the beginning of his contact with Izen that his purpose and intent was to disguise the source of money illegally obtained from the sale of stolen oil. Izen explained to Climer how to repatriate the money through loans back to himself disguised as loans from foreign investors. Climer made it clear he and his partner did not want their names on the accounts because "that kills the whole purpose of it." Izen told Climer that a loan from the trust would be through an application to the trustee, and that the trust would own the funds.[23] As Izen put it, "you have to give up something to get something." Izen insisted that in this way, a loan from the trust to Climer was not really a just loan to and from Climer himself. Izen knew at all times that he was setting up a financial transaction the purpose of which was to conceal the source of proceeds from an illegal activity. Izen arranged to make Climer and his unidentified partner beneficiaries for a trust in the Turks and Caicos Islands, and to facilitate repatriation of the money in the form of loans to Climer and his partner from the trust. Thus, even accounting for Izen's explanations, which is not required, Catalina had sufficient information to support a belief to a "fair probability" that Izen had

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[23] Although the United States has attested that complete and accurate tapes have been provided to Izen, Izen makes the conclusory and self-serving assertion that transcripts have been doctored. The only specific allegation Izen makes is that the December 26, 1991 transcript does not reflect an argument he recalls having with Climer regarding the ownership of trust funds. Izen does not submit the entire December 26, 1991 transcript or the tape for the Court's consideration. However, the substance of the allegedly omitted conversation is reflected in the September 5, 1991 transcript. Izen does not raise a genuine fact issue as to probable cause for the prosecution.

aided and abetted, or had conspired to commit, if not personally had committed, money laundering.

Izen further argues that his malicious prosecution claim is supported by Defendants' failure to investigate certain exculpatory information. Izen's argument misses its mark. It is true that deliberately concealing or failing to disclose known exculpatory evidence can form the basis for an inference that a defendant acted with malice in initiating and maintaining a prosecution. *Sanders v. English*, 950 F.2d 1152, 1163 (5th Cir. 1992). However, Izen's allegations relate not to the government agents' withholding of exculpatory information, but rather Defendants' alleged failure to investigate adequately.[24] Izen cannot base his malicious prosecution claim on mere negligence by Defendants in their investigation. *Id.* at 1159. A malicious prosecution claim evaluates the evidence as of the time charges are brought. *Gordy*, 294 F.3d at 728. Izen presents no evidence that he informed Defendants or any investigators, of any of his post hoc explanations.

In any event, in response to Catalina's detailed listing of information in support of probable cause, Izen presents

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[24] Izen cites *Dirienzo v. United States*, 690 F. Supp. 1149 (D. Conn. 1988). In that case, the plaintiff claimed that even if there was probable cause to institute the prosecution, there was no probable cause to continue the prosecution after further information and the opportunity to investigate became available. *Id.* at 1157-58. The court noted that "continued prosecution after facts sufficient to exonerate the accused have been provided may give rise to an action for malicious prosecution under New York law." *Id.* at 1158. Aside from being a statement of New York law, the principle expressed in Dirienzo is inapplicable here, since there is no evidence that Defendants knowingly withheld exculpatory information from the grand jury. Izen was not indicted for his activities with NLIC, nor for failure to file tax returns or other tax crimes. He was indicted for his conduct during the undercover operation.

only his own denials and assertions as to the existence of "exculpatory" evidence, *e.g.*, Chilton Bank records that allegedly would refute Easton's assertion that Izen transferred large sums of money from the bank. Izen does not address the bulk of the evidence Catalina considered. Even if Izen's interpretation of the Chilton Bank records is accurate, the evidence is not actually exculpatory. It merely reflects that Izen did not use Chilton Bank as Catalina may have initially suspected. Izen's alleged involvement with Chilton Bank represents only a small portion of the information Catalina had at the time of his initial decision to pursue a criminal investigation and later to request that criminal charges be brought against Izen. Izen's representations do nothing to negate the incriminating statements and the suspicious actions by Izen reflected in the transcripts of his conversations with Climer.

Applying the applicable legal standards governing money laundering (and aiding and abetting or conspiracy to launder money) as well as the Fifth Circuit's test for probable cause, the Court concludes that Catalina had sufficient information to establish probable cause as a matter of law for the commencement of criminal proceedings against Izen, without any reliance on the information provided by the allegedly unreliable informant, Easton. Izen has failed to present evidence that creates a genuine question of fact that Defendant Catalina lacked probable cause to pursue criminal charges against Izen, or that Catalina targeted Izen because of Izen's representation of alleged tax evaders before the IRS. Accordingly, Catalina is entitled to summary judgment on Izen's § 1983 Fourth Amendment malicious prosecution claim.

2. Climer

As to Defendant Climer, summary judgment is appropriate for the same reasons set forth above.

Climer also is entitled to judgment as a matter of law because there is no evidence that he in any way caused the prosecution of Izen. Climer's only role was to pose as an investor seeking to launder funds obtained from the illegal sale of oil and to record his conversations with Izen. Climer was not involved in the decision to investigate or prosecute Izen and did not testify before the grand jury.

Izen argues that the law of the case precludes summary judgment on this second ground because the Fifth Circuit remanded the case for consideration only of whether Defendants had probable cause and acted with malice when prosecuting Izen. This argument is rejected. The Fifth Circuit did not address the "caused the prosecution" element of malicious prosecution. The Fifth Circuit's opinion does not preclude summary judgment in favor of Climer on this basis. "The law of the case doctrine applies only to issues that were actually decided, rather than all questions in the case that might have been decided but were not." *Clifford v. Gibbs*, 298 F.3d 328, 331 (5th Cir. 2002). Summary judgment in favor of Climer is warranted on Izen's malicious prosecution claim.

B. § 1983 Retaliatory Prosecution

Izen asserts a cause of action for retaliatory prosecution in violation of his First Amendment rights. The Fifth Circuit has held that a prerequisite for a claim of retaliatory criminal prosecution in violation of the First Amendment is proof of the common law elements of malicious prosecution. *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002). Because Izen has not adduced evidence sufficient to support his malicious prosecution claims, Izen similarly cannot meet his summary judgment burden on his retaliatory criminal prosecution claim.

Izen argues in support of his retaliatory prosecution claim that Defendants did not have probable cause to undertake the undercover operation against him. Plaintiff

has presented no authority for the proposition that a retaliatory prosecution claim may lie for an investigation undertaken without probable cause. Indeed, this assertion is contrary to law. The Fifth Circuit has held that government agents do not need even a reasonable suspicion[25] (let alone probable cause) to begin an undercover sting operation. *See United States v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991). Courts have "uniformly dismissed the notion that the government must have a pre-existing basis for suspecting criminal activity before targeting an individual in an investigation." *Id.* These decisions are based on the realization that "a defendant has no constitutional right to be free from investigation." *Id.*; *United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992) (citing the holding in *Allibhai*). Thus, Izen's theory that Catalina's or Climer's involvement in the undercover operation constitutes retaliatory prosecution in violation of his First Amendment rights is without legal merit.

Izen further fails to meet his burden to create a fact issue on the retaliatory motive element of his retaliatory prosecution claim. In *Izen*, the Fifth Circuit stated that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must show that he was prosecuted at least in part to retaliate for constitutionally protected conduct, and that "retaliation need not be the sole motive for prosecuting." 256 F.3d at 329 (emphasis added) (citing

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[25] *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Op. 2d 383 (1968); *United States v. Chavez*, 281 F.3d 479, 485 (5th Cir. 2002) (reasonable suspicion is a particularized and objective basis for suspecting criminal activity; it is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.)

Gates v. City of Dallas, 729 F.2d 343, 346 (5th Cir. 1984)).[26]

The Fifth Circuit had occasion to refine the standards governing a retaliatory prosecution or investigation claim in the very recent *Keenan* case. 290 F.3d at 258. In *Keenan*, the Fifth Circuit endorsed the settled law of other circuits holding that to establish a First Amendment retaliation claim in a case that does not involve an employment or contractual relationship with the government, plaintiff must show that (1) he was engaged in constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct. *Id.* at 258 (emphasis added). Although issued almost a year after *Izen*, the *Keenan* opinion does not cite *Izen* for the elements of a retaliatory prosecution claim. Instead, the Fifth Circuit based its holding on cases from the Eighth, Tenth, and Sixth Circuits: *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001) (holding that the defendants' adverse actions must be "motivated in part" against the plaintiffs' exercise of constitutionally protected conduct); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) (holding that the defendants' adverse

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[26] In *Gates*, the plaintiff challenged the City of Dallas's alleged practice of filing, upon probable cause, perjury charges against complainants who make false charges. 729 F.2d at 346. Plaintiff did not appeal, and thus waived, the ruling on her claim that the individual decision to prosecute her was motivated in part by the desire to retaliate for her allegedly constitutionally protected conduct. The Fifth Circuit's summary statement of the law on which the *Izen* court relied was thus dicta, and was made with no analysis. *See infra* analysis of the two cases cited in *Gates*.

actions must be "substantially motivated" against the plaintiffs' exercise of constitutionally protected conduct); and *Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000) (holding that the defendants' adverse actions must be "motivated at least in part" against the plaintiff's exercise of constitutionally protected conduct.).

The *Keenan* decision is consistent with the Fifth Circuit's earlier explanation of the "at least in part" standard in *Smith v. Hightower*, 693 F.2d 359, 367 (5th Cir. 1982), which standard had previously had been enunciated in *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). In *Smith* the prosecutor argued that the "at least in part standard" placed too low of a threshold on the plaintiff to make a case for retaliation because that standard, in effect, made any showing of retaliatory motive sufficient to meet the plaintiff's burden. The *Smith* court addressed this concern by explaining that the "at least in part" language must be read in conjunction with the clear holding in *Wilson* that the state may have many legitimate reasons for bringing a criminal prosecution and that it is only when the state's primary purpose is to retaliate for protected conduct that a plaintiff's rights are violated. *Smith*, 693 F.2d at 367 (emphasis added). Thus, the *Smith* court observed that "the *Wilson* Court contemplated that the plaintiff must prove retaliation was a major motivating factor and played a prominent role in the decision to prosecute." *Id.* (emphasis added).

Izen asserts in his retaliatory prosecution claim that his rights were violated because Defendants allegedly lacked probable cause to pursue criminal charges after the sting operation concluded. Independent of the fact that Izen has failed to meet his burden on the probable cause element, the focus for summary judgment is whether Izen has created a genuine question of material fact on the issue of whether Defendants' alleged desire to thwart Izen's exercise of a constitutionally protected right was a major motivating factor in Defendants' decision to

seek criminal charges against him. The Court concludes that Izen has failed to meet his summary judgment burden here also. Izen completely fails to present any evidence, direct or circumstantial, that Catalina or Climer had any retaliatory motivation against him. In addition, Defendants' evidence clearly establishes legitimate and substantial reasons for the money laundering investigation and prosecution aside from any alleged retaliatory motive. Defendants thus have met their summary judgment burden to present evidence that establishes probable cause for the prosecution as a matter of law, and have adduced uncontradicted evidence that retaliation was not a major motivating factor in the decision to investigate. Izen has not presented probative admissible evidence that creates a genuine fact issue on this element.

Izen, alternatively, contends that the Fifth Circuit's ruling requires a trial on the retaliatory prosecution claim. The Court disagrees. The Fifth Circuit reversed the grant of summary judgment against Izen on this claim because "based on the record and the briefs, there is a genuine issue of material fact as to the reasons Izen was investigated and prosecuted." *Izen*, 256 F.3d at 329. Defendants' first motion for summary judgment and Plaintiff's response focused on whether Catalina's grand jury testimony was false and, therefore, constituted evidence of a retaliatory motive. *See supra* note 8 (quoting Catalina's grand jury testimony at issue). The Fifth Circuit's holding was expressly based on the limited record and briefs before that Court. The record was not complete as to the reasons Izen was investigated and prosecuted. Defendants now have submitted evidence to "explain the connection between Izen's late filing of tax returns and the agent's decision to begin an undercover sting operation to investigate possible money laundering through offshore trusts." *Izen*, 256 F.3d at 329. As noted above, Izen has not produced evidence sufficient to create a genuine fact issue on the retaliation claim. The law of

the case does not preclude summary judgment under these circumstances. *See United States v. Becerra*, 155 F.3d 740, 752-53 (5th Cir. 1998) (the law of the case doctrine precludes reexamination of an issue of law or fact by the district court on remand unless the evidence on retrial is substantially different, controlling authority has since made a contrary decision on applicable law, or the decision was clearly erroneous).

Summary judgment is appropriate on Izen's retaliatory prosecution claim.

C. Qualified Immunity

Determination of qualified immunity requires a two-step inquiry. *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). The Court must first determine whether plaintiff's allegations, if true, establish a constitutional violation. *Roe v. Texas Dept. of Protective & Regulatory Services*, 299 F.3d 395, 401 (5th Cir. 2002) (citing *Hope v. Pelzer*, 536 U.S. 730, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002)); *Keenan v. Tejeda*, 290 F.3d 252, 261 (5th Cir. 2002). The next question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *see also Roe*, 299 F.3d at 401 (only if the Court decides that the defendants engaged in constitutionally impermissible conduct must it proceed to the second step, which is to determine whether defendant's actions "violated clearly established statutory or constitutional rights of which a reasonable person would have known.").

Having determined that Izen cannot prove his malicious prosecution or retaliatory prosecution claims, the Court concludes that Izen cannot prove a constitutional violation sufficient to overcome Defendants'

qualified immunity.[27] However, even if Izen could show a constitutional violation, Defendants are entitled to qualified immunity under the second prong of the inquiry. The evidence and information against Izen was more than sufficient to make Catalina's and Climer's actions objectively reasonable.[28] Izen has failed to raise a genuine fact issue that it should have been clear to Defendants that investigation and prosecution of Izen for aiding and abetting money laundering and conspiracy to launder money would violate his constitutional rights. *See Saucier*, 533 U.S. at 202. Thus, Defendants Catalina and

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[27] Defendants also argue, based on *Albright v. Oliver*, 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994), that there was no clearly established constitutional right to be free from malicious prosecution at the time of Izen's prosecution. It is not necessary to make such a ruling in this case because even if such a right existed, it clearly was not violated.

[28] Scattered throughout Plaintiffs' briefing are requests for additional discovery on the issue of Defendants' "good faith." *See, e.g.*, Plaintiffs' Response to Motion to Dismiss or for Summary Judgment After Remand and Supplement and Defendants' Position on Discovery After Remand [Doc. # 85], at 14. Izen claims that additional discovery is necessary as to the motive and intent behind Defendants' investigation and prosecution of Izen. Much information has already been disclosed to Izen. *See* Defendants' Position on Discovery After Remand [Doc. # 78]. Izen has in his possession all documents from his criminal case, including tapes and transcripts of his conversations with Climer. Izen also has been provided numerous IRS documents relating to the decision to investigate and prosecute him. *Id.* Izen has stated that he needs the identity of other TRS officials who have circulated the information provided by Easton, and the deposition of Easton and his attorney. Izen's discovery requests are futile and are rejected. Contrary to his characterization, the prosecution ultimately was not based solely, if at all, on information provided by Easton. The Court has found that sufficient information was available aside from the initial information from Easton to establish that probable cause existed.

Climer are entitled to qualified immunity from Izen's § 1983 claims.

Izen also requests disclosure of grand jury materials. The Court has previously denied this request. Order issued September 9, 2002 [Doc. # 105]. On reconsideration here, the Court again finds that Izen has shown no compelling need for disclosure of grand jury materials. As the Court has made clear, the decision to dismiss Plaintiffs' claims is not dependent on a finding about Catalina's testimony to the grand jury as to whether Izen had paid his taxes. Further discovery on this point is immaterial.

D. Tort Claims Against the United States

Izen asserts a cause of action against the United States under the Federal Tort Claims Act ("FTCA") based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress and negligence. The FTCA acts as a waiver of the United States' sovereign immunity for certain torts committed by its employees. *See* 28 U.S.C. § § 1346(b), 2674. The FTCA provides that "the United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

An individual may bring a claim against the United States pursuant to the FTCA only to the extent he has presented the claim to the appropriate federal agency and his claim has been finally denied by the agency in writing, or until six months have passed without agency disposition. 28 U.S.C. § 2675. A litigant cannot base any part of a tort action against the United States on claims not presented to the appropriate administrative agency. *Rise v. United States*, 630 F.2d 1068, 1071 (5th Cir. 1980). "[A] Federal Tort Claims Act suit can be based on particular facts and theories of liability only when those facts and theories can be considered part of the plaintiff's administrative claim." *Id.* Facts and theories of liability

can be considered part of a plaintiff's administrative claim "as long as a claim brings to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." *Id.*

In this case, Izen's administrative claim was based on his allegations that during the sting operation, Defendants attempted to utilize a Treasury disbarment proceeding to gather information and statements from Izen in violation of his Fifth Amendment right against self-incrimination, and that Catalina lied to the grand jury in May 1995 by testifying that Izen had not paid taxes for 1986, 1987, or 1988.[29] The administrative claim asserts that such actions violated Izen's constitutional rights, violated the Internal Revenue Code, subjected him to unlawful criminal investigation and prosecution, and caused him to suffer mental anguish. Izen sought $ 1,000,000 in damages for himself and $ 100,000 for loss of consortium damages for his wife. Plaintiffs' current FTCA claims go far beyond the scope of the administrative claim set forth above.[30] Thus, Izen's (and his wife's) FTCA

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[29] The administrative claim actually says "taxable years 1996, 1997, and 1998," but the Court will assume for these purposes that the misidentification of years is merely a typographical error of which all parties were aware during the administrative process.

[30] Prime allegations underlying Plaintiffs' FTCA claim in this Court are that Defendants relied on allegedly false information supplied by the informant Easton and Defendants failed to investigate what Izen characterizes as "exculpatory" evidence. These allegations were not included in the administrative claim. In addition to asserting materially new and different factual allegations. Plaintiffs' current claim seeks actual damages of $ 4,000,000 and mental anguish damages for Karen Izen of $ 1,000,000.

claims fail for lack of exhaustion. Plaintiffs' FTCA claims also fail on their merits, as discussed below.

The United States is liable only to the extent its employees would be liable under state law. Because Defendants have established that probable cause existed for prosecution of Izen, Izen's FTCA claim based on malicious prosecution and false arrest[31] fail, and will be dismissed.[32]

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[31] Probable cause in a malicious prosecution claim under Texas law closely follows the federal standard and is defined as "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant] that the person charged was guilty of the crime for which he was prosecuted." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (citing *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517, 40 Tex. Sup. J. 839 (Tex. 1997)). False arrest claims under Texas law require proof of a willful detention of the person, against the person's consent, without authority of law. *Garza v. United States*, 881 F. Supp. 1103, 1107 (5th Cir. 1995); *Villegas v Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App.-- Corpus Christi 1998, pet. denied). The existence of probable cause provides authority to arrest.

[32] Izen contends that the United States' failure to certify that Catalina and Climer were acting within the scope of their employment somehow is fatally defective to the United States' motion. This contention lacks merit. Certification is required in order to substitute the United States as the sole defendant in a tort claim based on acts by government employees committed in the course and scope of their employment. The United States is the named defendant to Plaintiffs' FTCA cause of action, and is not arguing in its defense that Catalina and Climer were acting outside the scope of their employment. The cases cited by Plaintiffs are wholly inapposite. *See Garcia v. United States*, 62 F.3d 126, 127 (5th Cir. 1995) (holding that certification of scope of employment under the Westfall Act is subject to judicial review and that whether a particular federal employee was or was not acting within the scope of his employment is controlled by state law where the conduct occurred); *Mitchell v. Carlson*, 896 F.2d 128, 131 (5th Cir. 1990) (the court is barred by § (...continued)

Izen also seeks to assert an intentional infliction of emotional distress ("IIED") claim under Texas law.[33] A plaintiff must show for an IIED claim: (1) intentional or reckless acts by defendant; (2) that are extreme and outrageous; (3) causing the plaintiff emotional distress; (4) which emotional distress is severe. *Brewerton v. Dalrymple*, 997 S.W.2d 212, 215 (Tex. 1999) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621, 36 Tex. Sup. Ct. J. 827 (Tex. 1993)). Extreme and outrageous conduct is conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Twyman*, 855 S.W.2d at 621. This Court's finding that probable cause existed for the prosecution negates the element of "extreme and outrageous conduct."[34]

Izen and his wife also appear to assert a negligence claim, although Plaintiffs' submissions fail to disclose exactly what actions by Defendants Plaintiffs contend were negligent. The Court construes Plaintiffs' negligence claim to be that Defendants were negligent in allegedly failing to investigate "exculpatory" evidence as to Izen. Plaintiff cannot overcome the defects in his claim for

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1447(d) from reviewing on appeal or otherwise orders of remand for lack of jurisdiction in a Westfall Act case).

[33] In an Order issued September 9, 2002 [Doc. # 105], the Court denied Plaintiffs' Motion for Leave to File Second Amended Complaint [Doc. # 99]. Plaintiffs' proposed Second Amended Complaint renamed the FTCA cause of action "State Tort Claims -- Malicious Prosecution and False Arrest." It appears, therefore, that Plaintiffs intends to drop their FTCA claims based on negligence and intentional infliction of emotional distress. However, because the Court denied leave to amend, it addresses those claims here.

[34] Plaintiffs have also presented no evidence that any emotional distress they suffered was severe.

malicious prosecution or false arrest simply by casting the Defendants' actions as negligent. *Cf. McNeily v. United States*, 6 F.3d 343, 347 (5th Cir. 1993) ("a plaintiff cannot avoid the reach of § 2680(h) by framing his complaint in terms of negligent failure to prevent the excepted harm.")

Moreover, Plaintiffs' negligence claim is barred by the discretionary function exception to the FTCA. The discretionary function exception is found in 28 U.S.C. § 2680(a), which provides that the FTCA does not act as a waiver of sovereign immunity for any claim based upon "the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved can be abused." In *United States v. Gaubert*, 499 U.S. 315, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991), the Supreme Court outlined a two-step test for applying the "discretionary function" exception. First, the exception covers only acts involving "an element of judgment of choice," and not acts involving compliance with federal statutes, regulations, or policy. *Id.* at 322. Second, the exception applies only if the conduct is based on considerations of public policy. *Id.* at 323. Clearly, Defendants' decisions as to how to conduct the IRS criminal investigation fit both requirements of Gaubert.[35]

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[35] Plaintiffs argue that the qualified immunity of law enforcement officers does not shield the United States from liability, citing *Garza v. United States*, 881 F. Supp. 1103, 1106 (S.D. Tex. 1995). However, unlike the *Garza* case, the United States is not relying on immunity here, but on the discretionary function exception to liability. *See Id.* at 1106 n.3 ("The United States does not contend that the discretionary function exception [under § 2680(a)] would apply under the facts of this case."). The case at bar is also distinct from *Sutton v. United States*, 819 F.2d 1289, 1293-94 (5th Cir. 1987), in which the Fifth Circuit held that the United States could not rely on the discretionary function exception to trump the provision of § 2680(a) waiving sovereign immunity for the intentional tort of (...continued)

Plaintiffs cannot meet their burden of proof to create genuine issues of material fact on each required element of their FTCA claim, and thus all Plaintiffs' theories under that statute will be dismissed.

IV. CONCLUSION AND ORDER

Plaintiffs have failed to create a genuine issue of material fact as to the lack of probable cause for Defendants prosecution of Izen and thus cannot prove malicious prosecution. Plaintiffs also have not raised a genuine fact issue that Defendants' prosecution or investigation of Izen for aiding and abetting or conspiring to launder money violated Izen's First Amendments rights and constituted retaliatory prosecution. Thus, Defendants are entitled to summary judgment on Plaintiffs' malicious prosecution and retaliatory prosecution claims. The Court further finds that Defendants have qualified immunity from Plaintiffs' malicious prosecution and retaliatory prosecution claims. In addition, Plaintiffs' have not created a genuine issue of material fact as to the United States' liability under the Federal Tort Claims Act. It is therefore,

ORDERED that Defendants' Motion to Dismiss or For Summary Judgment After Remand [Doc. # 77] and United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 93] are GRANTED. It is further

ORDERED that all Plaintiffs' claims are DISMISSED WITH PREJUDICE.

The Court will issue a separate final judgment.

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malicious prosecution in the case of law enforcement officers. Here, the discretionary function exception shields the United States from liability on the Plaintiffs' negligence claim.

SIGNED at Houston, Texas, this 18th day of September, 2002.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

In accordance with the Memorandum and Order issued this day, it is hereby

ORDERED that Defendants' Motion to Dismiss or For Summary Judgment After Remand [Doc. # 77] and United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 93] are GRANTED. It is further

ORDERED that all Plaintiffs' claims against all Defendants are DISMISSED WITH PREJUDICE.

The parties shall pay their own costs incurred in this action.

SIGNED at Houston, Texas, this 18th day of September, 2002.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 99-21031

JOE ALFRED IZEN, JR.,
Plaintiff-Appellant,

versus

TERRANCE CATALINA, Special Agent,
In his Official and Individual Capacity;
JAMES CLIMER, Special Agent,
In his Official and Individual Capacity,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

June 29, 2001

Before JOLLY, MAGILL*, and BENAVIDES, Circuit Judges.

PER CURIAM:

In late 1989, the IRS initiated an administrative proceeding to suspend Joe Alfred Izen, an attorney, from practicing before the IRS. Patrick McDonough, an attorney with the Office of Director of Practice (which is independent of the IRS), recommended that Izen be suspended because he had failed to timely file federal income tax returns for 1980, 1981, and 1982.

During this administrative disbarment proceeding, McDonough denied that the IRS was pursuing criminal

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* Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

charges against Izen. Relying on this statement, Izen testified before the administrative law judge. In late 1991, McDonough learned that Izen was in fact the target of an ongoing criminal investigation conducted by the IRS. McDonough then dismissed the administrative complaint against Izen.

The ongoing criminal investigation began in early 1990 (shortly after the administrative proceedings had begun). IRS agent Terrance Catalina directed the investigation. Another IRS agent, James Climer, posed as an oil investor with illegal funds that needed "laundering." Catalina's investigation of Izen resulted in an indictment in 1995. The indictment alleged that Izen created a foreign trust for the purpose of money laundering. Izen plead "not guilty" to the money laundering charges, raising the defenses of entrapment, prosecutorial misconduct, and tainted evidence. He filed a motion to suppress all evidence obtained through the administrative proceedings.

The district court judge hearing the money laundering case denied Izen's motion to suppress. He explained that there was no duplicity between McDonough and Catalina: "Two government agencies [were] separately conducting their business with neither knowing what the other was doing, and with the resulting mistake by McDonough providing no benefit to the government and causing no harm to Izen." In May 1996, before the case went to trial, however, the government moved to dismiss all pending criminal charges against Izen.

In May 1997, Izen filed this *Bivens* suit, seeking $ 4 million in damages, against Catalina and Climer in both their official and individual capacities. Izen alleged that the IRS agents subjected him to malicious and retaliatory prosecution and violated his Fifth Amendment privilege against self-incrimination.

Catalina and Climer filed motions to dismiss for lack of jurisdiction and for failure to state a claim on which relief can be granted, as well as a motion for summary judgment on qualified immunity grounds. The district court referred the matter to a magistrate judge, who issued a memorandum recommending that Izen's claims be dismissed. Izen filed objections, but the district court adopted the magistrate judge's recommendation. The district court dismissed in part, and granted summary judgment in part.

DISCUSSION

On appeal, Izen raises his Fourth Amendment claim of malicious prosecution arguing that the criminal charges against him were terminated in his favor. He also claims that the criminal charges were brought in retaliation in violation of his First Amendment rights. Moreover, Izen appeals certain discovery and evidentiary rulings. Lastly, Izen appeals the district court's grant of summary judgment in favor of the government on qualified immunity grounds. Climer also continues to argue that the court lacks personal jurisdiction over him due to improper service of process. Each issue will be addressed in turn.

Personal Jurisdiction

The district court properly exercised personal jurisdiction over Climer. Izen complied with Rule 4(e)(1), which allows service pursuant to the law of the state where the district court is located or where service is effected. Fed. R. Civ. Proc. 4(e)(1). Oklahoma law provides that: "Service by mail shall be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee." OKLA. STAT. ANN. tit. 12, § 2004(C)(2)(b). Oklahoma courts, however, require only "substantial compliance" with the statutes. *Graff v. Kelly*, 814 P.2d 489 (Okla. 1991). Thus, the Tenth Circuit has held that

service of process was valid where someone other than the addressee signed the return receipt but the defendant received actual notice of the attempted service. *Kitchens v. Bryan Co. Natl. Bank*, 825 F.2d 248, 256 (10th Cir. 1987)("In Oklahoma, the object of the state notice statutes is to provide a method of notification which 'is reasonably calculated to give [the defendant] knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard. No rigid formula exists as to the kind of notice that must be sent; the notice required will necessarily vary with the circumstances and conditions.'"). Some Oklahoma courts have even suggested that service of process is sufficient to confer personal jurisdiction if it informs the defendant that he has been sued. *See Shamblin v. Beasley*, 1998 OK 88, 967 P.2d 1200, 1210 (Ok.1998); *see also Van Nort v. Davis*, 800 P.2d 1082 (Okla. App. 1990).

In the instant case, Izen sent service of process to Climer's Oklahoma City office at a time when he no longer worked there, and someone else signed the receipt. Climer received prompt, actual notice of the suit. The summons was delivered to the IRS office on April 15, 1998. On May 6, 1998, Climer filed a motion to enlarge the time to file an answer. Previously, Izen solicited information from the IRS regarding the manner in which Izen could effect service upon Climer and, as the district court found, the IRS failed to provide full and accurate information. Given Climer's actual notice of this suit and the circumstances surrounding the method of notification, it is clear that the method of notification was reasonably calculated to give, and in fact, did give the defendant at a meaningful time and in a meaningful manner knowledge of the attempted exercise of jurisdiction to give the defendant an opportunity to be heard. Accordingly, the district court did not err in exercising jurisdiction over Climer.

Malicious Prosecution

Izen has properly brought this suit for damages against the defendants in their individual capacities alleging that federal officers violated his constitutional rights. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). This Circuit has long recognized a constitutional right under the Fourth Amendment "to be free from malicious prosecution." *Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir. 1999); *see also Eugene v. Alief Ind. Sch. Dist.*, 65 F.3d 1299, 1303, 1305 (5th Cir. 1995)(holding that this right was clearly established as early as 1972). But "malicious prosecution may be a constitutional violation . . . only if all of its common law elements are established." *Evans v. Ball*, 168 F.3d 856, 862 n.9, 863 (5th Cir. 1999). To sustain a malicious prosecution claim, Texas law requires that a plaintiff show "(1) a criminal action was commenced against him; (2) the prosecution was caused by the defendant or with his aid; (3) the action terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause; (6) the defendant acted with malice; and (7) the criminal proceeding damaged the plaintiff." *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994).

The district court dismissed Izen's malicious prosecution claim because Izen failed to state a claim for which relief could be granted. Specifically, the district court found that the criminal proceeding did not terminate in favor of Izen. This Court reviews a district court's dismissal of a claim under Rule 12(b)(6) *de novo*. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 585 (5th Cir. 1999).

The IRS agents and the district court rely on language in Evans stating that "proceedings terminate in favor of the accused only when they affirmatively indicate that [the accused] is not guilty." *Evans*, 168 F.3d at 859;

see also Taylor, 36 F.3d at 456. We find both *Evans* and *Taylor* factually distinguishable from the case at hand and the rule therein not controlling. In both *Evans* and *Taylor*, the plaintiff in the malicious prosecution suit had entered into a plea bargain in order to terminate the criminal proceedings. In *Evans*, for example, the plaintiff retired from his government job in exchange for a dismissal of the criminal charges. In Izen's case, there is no quid pro quo.

In *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995), when determining whether the criminal proceeding terminated in the plaintiff's favor, this Court noted that "an order of dismissal based on the affirmative decision not to prosecute are examples of such termination." *Brandley*, 64 F.3d at 199. Similarly, in *Kerr*, the defendants were indicted, but the charges against them were dropped. This Court found that the elements of a malicious prosecution claim were satisfied, including termination in their favor, except for probable cause. *Kerr*, 171 F.3d at 340. Also, in *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), the claims against the plaintiff were dismissed. This Court in determining whether the statute of limitations had run on the plaintiff's malicious prosecution claim held that "Brummett's suit was filed less than two years after the underlying criminal proceeding terminated in his favor." *Brummett*, 946 F.2d at 1184.

Additionally, Texas courts have held that a prosecution has been terminated in the accused's favor where the prosecutor has dismissed the charges. *See Thrift v. Hubbard*, 974 S.W.2d 70, 78 (Tex. App. San Antonio, 1998); *Leal v. American Nat'l Ins. Co.*, 928 S.W.2d 592, 597 (Tex. App.-Corpus Christi, 1996). Thus, in instances where the criminal defendant's charges were dismissed without a quid pro quo arrangement, this Court has found that the prosecution terminated in their favor. In the instant case, the charges against Izen were

dropped and the government moved to dismiss the case without any concession or agreement by Izen. Accordingly, we find that the underlying claim in the instant case was terminated in Izen's favor. We therefore vacate the district court's dismissal of Izen's malicious prosecution claim and remand for consideration whether the defendants had probable cause and acted with malice when prosecuting Izen.

Retaliatory Prosecution

In granting summary judgment in favor of the defendants in regard to Izen's retaliatory prosecution claim, the district court required that Izen show a material issue of fact that "there was no legitimate purpose at all for the Defendants' conduct." The rule in this Circuit, however, is that a plaintiff alleging retaliatory prosecution must show that he was "prosecuted at least in part to retaliate for constitutionally protected conduct." *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984). As the rule articulated in *Gates* makes clear, retaliation need not be the sole motive for prosecuting. Therefore, the district court was mistaken in requiring Izen to prove that "there was no legitimate purpose at all for the Defendants' conduct."

The district court concluded that the IRS agents had a legitimate reason for instituting its criminal investigation: Catalina learned that Izen had not timely filed tax returns. However, neither the district court nor the IRS agents explain the connection between Izen's late filing of tax returns and the agents' decision to begin an undercover sting operation to investigate possible money laundering through offshore trusts. Based on the record and the briefs, there is a genuine issue of material fact as to the reasons Izen was investigated and prosecuted and therefore we vacate the grant of summary judgment as to Izen's retaliatory prosecution claim.

Self-Incrimination

The district court dismissed Izen's Fifth Amendment claim. The court held that collateral estoppel applied because previously, at a pretrial motion in the money laundering suit, the judge denied a motion to suppress because he saw no Fifth Amendment violation. Even if collateral estoppel does not apply as Izen contends, we find, however, that Izen's Fifth Amendment claim lacks merit and therefore affirm the district court's grant of summary judgment in this regard. Izen claims that, because he was not informed of the ongoing criminal investigation at the time he testified in civil court, he unfairly incriminated himself. At the time Izen testified at the civil trial, however, he knew there was a possibility he was incriminating himself, even if there were not ongoing criminal charges, and could have exercised his Fifth Amendment rights. "[A] witness may properly invoke the Fifth Amendment 'privilege against compulsory self-incrimination . . . 'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory' when he [or she] 'reasonably apprehends a risk of self-incrimination, . . . though no criminal charges are pending against him [or her], . . . and even if the risk of prosecution is remote.'" *Doe v. Louisiana*, 2 F.3d 1412 at 1419 n.14 (5th Cir. 1993)(citations omitted). Moreover, there is no showing that these statements were used against Izen or affected the proceedings as both the criminal and civil actions were dismissed. *United States v. Tapp*, 812 F.2d 177, 179 (5th Cir. 1987). We therefore affirm the district court's dismissal of Izen's Fifth Amendment claim.

Grand Jury Minutes

Izen also appeals the district court's decision which denied Izen's motion to disclose grand jury minutes. This court reviews a district court's decision regarding disclosure of grand jury materials under an abuse of discretion standard. *In re Grand Jury Testimony*, 832

F.2d 60, 60-2 (5th Cir. 1987). "Rule 6(e) provides certain exceptions, and case law has established that a district court may properly order release of grand jury materials where a party demonstrates with particularity a 'compelling necessity' for the materials." *Id.* at 62-63. We find that Izen has not shown a compelling necessity and the district court did not abuse its discretion in denying this motion.

Qualified Immunity

Izen also appeals the district court's grant of summary judgment based on qualified immunity. The basic rule of qualified immunity is that: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Having determined that Izen's constitutional claims were not viable, the district court reasoned that it would not be obvious to the defendants that they were violating Izen's constitutional rights, and accordingly dismissed the claims on the alternative basis of qualified immunity. In as much as we have set aside the district court's finding with respect to Izen's First and Fourth amendment claims, the rationale for the district court's granting qualified immunity evaporate and we remand the qualified immunity issue for reconsideration.

Discovery

In this regard, Izen also argues that the district court abused its discretion in not allowing discovery prior to ruling on the qualified immunity motion. Generally, a court should allow discovery only if it finds that the officer's conduct violated a clearly established right. *See Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991). Because we have remanded Izen's First

and Fourth Amendment claims, we vacate this ruling and instruct the court to consider this claim in light of its findings on remand.

Accordingly, we AFFIRM the district court's dismissal of Izen's Fifth Amendment claim and its denial of Izen's motion to disclose grand jury minutes; the orders dismissing Izen's malicious prosecution claim, granting qualified immunity and granting summary judgment in regard to Izen's retaliatory prosecution claim are VACATED and the case is remanded to the district court for further proceedings consistent with this opinion.

FILED
SEP 12 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-64

In the Supreme Court of the United States

JOE ALFRED IZEN, JR., ET UX., PETITIONERS

v.

TERRANCE CATALINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
JONATHAN S. COHEN
JOHN A. DUDECK, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

No. 05-64

JOE ALFRED IZEN, JR., ET UX., PETITIONERS

v.

TERRANCE CATALINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 398 F.3d 363. The vacated opinion of the court of appeals (Pet. App. 12a-24a) is reported at 382 F.3d 566. The opinion of the district court (Pet. App. 25a-60a) is reported at 251 F. Supp. 2d 1327. An earlier opinion of the court of appeals (Pet. App. 61a-70a) is reported at 256 F.3d 324.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2005. A petition for rehearing en banc was denied on April 12, 2005. The petition for a writ of certiorari was filed on July 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Joe Alfred Izen, Jr., is a Texas attorney who has long represented tax protesters and other defendants in criminal tax cases.[1] In August 1989, respondent, who was then a special agent with the Internal Revenue Service (IRS) Criminal Investigation Division (CID) in Houston, Texas, received a referral from the IRS Collection Division in Waco, Texas, advising that Izen had not filed income tax returns for 1986, 1987, and 1988. The referral also contained allegations from an informant that Izen was involved in money laundering and the failure of a private bank, and had accounts in foreign countries. Respondent knew nothing about Izen before the referral. Pet. App. 2a, 26a; 2 C.A. R. 780-781, 798-799.

In October 1989, the referral was accepted by CID for investigation as a tax evasion case. No recommendation was made to open a money laundering case at that time, because the allegations by the informant had not been sufficiently corroborated. Around the same time, a request was prepared for a grand jury investigation of potential criminal tax violations. The request pointed out that Izen had been in-house legal counsel for Nassau Life Insurance Co. (Nassau Life), a company in the Bahamas that had allegedly sold foreign business trusts for use in schemes to evade federal taxes. It was recommended that the investigation be conducted with a grand jury because many of the potential witnesses were tax protesters who would be hostile to government agents and would refuse to comply with administrative sum-

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[1] Izen's wife, Karen Suter Izen, is also a petitioner. References in this brief to "Izen" are to Joe Alfred Izen, Jr.

monses issued by the IRS. Pet. App. 2a, 9a-10a, 26a, 38a-40a; 2 C.A. R. 766, 774, 793-794.[2]

In December 1989, in a case summary report, respondent's supervisor summarized the facts relating to Izen's alleged involvement in money laundering, 2 C.A. R. 753-756, and concluded that the "potential for an undercover operation is good," *id.* at 755. The report directed respondent to "set up [an] undercover operation." *Id.* at 753.

Respondent thereafter learned from sources other than the informant that Izen had tried to set up offshore bank accounts on a number of occasions, had visited several countries known to be tax havens, and had agreed to set up a foreign trust. Money launderers frequently use offshore banks, tax havens, and foreign trusts. Respondent also learned that Izen had a bank account in the Bahamas, a tax haven, but, contrary to federal tax law, had not declared on his 1985 tax return that he had an interest in, or signature authority over, the account. In addition, respondent learned that Nassau Life, the company of which Izen was in-house counsel, had employed fugitives and had been used to commit illegal acts that may have included money laundering. Finally, respondent learned that there had been over 100 tax cases, and 31 convictions, involving Nassau Life. Pet. App. 9a-10a, 38a-41a; 2 C.A. R. 722-726, 732, 788-789.

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[2] Izen filed his 1986 tax return in September 1989, and filed his 1987 and 1988 returns in April 1990. The belated filing of those returns, however, did not render the investigation moot. As the request for a grand jury investigation noted, one of the matters under investigation was whether Izen had concealed his interests in foreign bank accounts. Filing a return that does not report income from a foreign bank account could constitute tax evasion. Pet. App. 26a-27a; 2 C.A. R. 766.

In April 1990, respondent prepared a request for an undercover money laundering operation, which was subsequently approved by various IRS officials, including the Assistant Commissioner in charge of criminal investigations. The undercover operation lasted from 1990 to 1992. During the investigation, an IRS special agent posed as someone seeking to create a foreign trust for the deposit of proceeds from the sale of purportedly stolen oil. Izen helped the undercover agent launder the money by establishing offshore accounts and a foreign trust and by using a bank in a tax haven. Pet. App. 3a, 11a, 41a-42a; 2 C.A. R. 728-735, 788.

In May 1995, respondent testified before a grand jury, which returned a four-count indictment charging Izen with conspiracy to commit money laundering and aiding and abetting money laundering. In May 1996, the charges were dismissed. Pet. App. 4a, 27a.

2. Izen thereafter sued respondent under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Asserting malicious prosecution, retaliatory prosecution, and other constitutional tort claims, the complaint alleged that the impetus for the investigation and prosecution was a desire to retaliate against Izen for his association with tax protesters and his representation of criminal tax defendants. The district court dismissed all of Izen's claims, but the court of appeals reversed the dismissal of the malicious prosecution and retaliatory prosecution claims. Pet. App. 4a, 61a-70a.

3. On remand, after respondent supplemented the record, the district court granted summary judgment for respondent on Izen's claims of malicious prosecution and retaliatory prosecution. Pet. App. 25a-60a. With respect to the latter claim, the district court concluded

both that Izen had "completely fail[ed] to present any evidence" that respondent "had any retaliatory motivation" and that respondent's evidence "clearly establishes legitimate and substantial reasons for the money laundering investigation and prosecution." *Id.* at 51a. The court explained that respondent had therefore "present[ed] evidence that establishes probable cause for the prosecution as a matter of law" and "adduced uncontradicted evidence that retaliation was not a major motivating factor in the decision to investigate." *Ibid.* In the alternative, the district court held that, even if Izen could establish a constitutional violation, respondent was entitled to qualified immunity, because the evidence against Izen was "more than sufficient" to make respondent's actions "objectively reasonable." *Id.* at 53a.

4. The court of appeals initially reversed the district court's entry of summary judgment on the retaliatory prosecution claim. Pet. App. 12a-24a. After respondent filed a petition for rehearing, however, the court of appeals vacated its original opinion and substituted an opinion that affirmed the district court's judgment. *Id.* at 1a-11a.

With respect to the retaliatory prosecution claim, the court of appeals held that Izen was required to establish "each of the common law malicious prosecution elements," one of which is "an absence of probable cause to prosecute." Pet. App. 7a (quoting *Keenan* v. *Tejeda*, 290 F.3d 252, 257 (5th Cir. 2002)). The court held that Izen could not establish that element, because respondent had "verifiable, independent information concerning Izen's questionable activities that amounted to probable cause." *Id.* at 9a. See *id.* at 9a-11a (describing evidence). Having held that Izen could not establish an essential element of retaliatory prosecution, the court of

appeals found it unnecessary to "reach the qualified immunity issue." *Id.* at 11a n.9.

ARGUMENT

Petitioners contend (Pet. 8-18) that the absence of probable cause is not an element of a claim of retaliatory prosecution in violation of the First Amendment, and that the court of appeals' contrary decision conflicts with decisions of three other circuits. Petitioners ask this Court (Pet. 19) either to grant certiorari or to hold the petition pending the Court's decision in *Hartman* v. *Moore*, cert. granted, No. 04-1495 (June 27, 2005). The court of appeals' decision is correct. And while there is a circuit conflict on the question whether probable cause defeats a claim of retaliatory prosecution, there is no need for the Court to grant certiorari or to hold the petition pending the decision in *Hartman*, which presents the same question, because respondent is entitled to qualified immunity regardless of whether the absence of probable cause is an element of a claim of retaliatory prosecution. The petition should therefore be denied.

1. The process leading to a decision to prosecute is one that courts are hesitant to examine, because it is "particularly ill-suited to judicial review," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), and examination by courts risks "unnecessarily impair[ing] the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996). This Court has relied on those considerations in a variety of contexts, including cases involving a claim of selective prosecution in violation of the defendant's equal protection rights. The Court's decisions make clear that the standard for stating a claim of selective prosecution is exceptionally demanding and thus rarely satisfied.

United States v. *Bass*, 536 U.S. 862 (2002) (per curiam); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1999); *Armstrong*, *supra*; *Wayte*, *supra*. In a selective prosecution case, there must be both a subjective showing that the decision to prosecute was motivated by a discriminatory purpose and an objective showing that similarly situated members of a different class were not prosecuted. *Armstrong*, 517 U.S. at 465. Since this Court's decisions make clear that a claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution, *ibid.*, petitioners are mistaken in their contention (Pet. 15-16) that a claimant *can* establish *retaliatory* prosecution merely by showing that his *speech* was the but-for cause of the prosecution. These similar types of constitutionally prohibited prosecutions should be treated similarly.

Contrary to petitioners' contention, a claim of retaliatory prosecution requires an objective showing, and that showing is an absence of probable cause for the charges. Retaliatory prosecution is a form of malicious prosecution (the malicious purpose being retaliation for the defendant's speech), and the absence of probable cause is an essential element of a claim of malicious prosecution. That was the common law rule when the First Amendment was adopted, see, *e.g.*, *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 550-551 (1861) (citing cases); 3 William Blackstone, *Commentaries* 127 (1768), and it remains the common law rule today, see, *e.g.*, Restatement (Second) of Torts § 653, at 406 (1977); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991). Because the "particular concern" about the "systemic costs" of judicial inquiry necessitates an objective element for a claim that a prosecution was moti-

vated by a constitutionally prohibited factor, *Wayte*, 470 U.S. at 607, and because this Court routinely consults the common law in attempting to determine the content of constitutional provisions, a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges.

Petitioners rely (Pet. 15-17) on this Court's decisions in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), but those cases are inapposite. *Mount Healthy* did not involve retaliatory *prosecution*. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Mount Healthy* involved retaliatory action against an *employee* by a public *employer*, and thus the special considerations governing constitutional challenges to prosecutorial decisionmaking were inapplicable. As for *Crawford-El*, that case rejected "special procedural rules" for "constitutional claim[s] that require[] proof of improper motive," 523 U.S. at 577, and also rejected a "proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent," *id.* at 594. This case does not implicate an across-the-board rule of procedure or immunity for claims requiring proof of improper motive. Rather, the rule applied by the court of appeals is that, in the unique context of prosecutorial decisionmaking (which was not at issue in *Crawford-El*), a substantive claim of retaliation in violation of the First Amendment will not lie if the charges were supported by probable cause.

2. In agreement with the court below, four other circuits have held that the absence of probable cause is

an element of a claim of retaliatory prosecution.[3] Three circuits have reached the opposite conclusion.[4] In *Hartman* v. *Moore*, No. 04-1495, this Court granted certiorari to resolve the conflict. 125 S. Ct. 2977 (2005). There is no need for the Court to grant certiorari in this case as well, or even to hold the petition pending the decision in *Hartman*, because Izen would not be entitled to relief even if this Court decided that probable cause does not defeat a claim of retaliatory prosecution.

A government official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Accordingly, even if respondent "violated a constitutional right," he is still entitled to qualified immunity if "the right was [not] clearly established." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). The constitutional right at issue here—the right to be free from a prosecution supported by probable cause that was motivated by the defendant's speech—was not clearly established when the criminal charges were filed

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[3] See *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), cert. denied, 125 S. Ct. 507 (2004); *Wood* v. *Kesler*, 323 F.3d 872, 883 (11th Cir.), cert. denied, 540 U.S. 879 (2003); *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992).

[4] See *Moore* v. *Hartman*, 388 F.3d 871, 877-881 (D.C. Cir. 2004), cert. granted, 125 S. Ct. 2977 (2005); *Greene* v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002); *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

against Izen. If anything, the law at that time was to the contrary.

By 1995, when the grand jury returned the indictment, the Fifth Circuit had already held that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must establish "all of the elements of the common law tort" of malicious prosecution, *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (1994), one of which is an absence of probable cause. Similarly, the Second Circuit had held that "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government." *Mozzochi* v. *Borden*, 959 F.2d 1174, 1180 (1992). Both of those decisions were relied upon by the Fifth Circuit in the decision below. Pet. App. 7a-8a. In contrast, no court of appeals squarely held that probable cause does *not* defeat a claim of retaliatory prosecution until 2001—six years after petitioner was indicted. See note 4, *supra*.

Nor is this Court's decision in *Hartman* likely to shed any additional light on the question whether the right at issue was clearly established in 1995. The petition in *Hartman* did raise the question whether, if law enforcement officers may be liable for retaliatory prosecution when there was probable cause for the charges, the law to that effect was clearly established in 1988, when the charges in that case were filed. 04-1495 Pet. (I). But the Court did not grant certiorari on that question. 125 S. Ct. 2977 (2005).[5]

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[5] The fact that petitioners also raise a claim of retaliatory *investigation* (Pet. 17-18) is not a reason to hold the petition for *Hartman*, because no such claim is raised in that case. There is also no reason for the Court to grant plenary review on the issue. First, as in

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decision in *Hartman* v. *Moore*, No. 04-1495, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
JONATHAN S. COHEN
JOHN A. DUDECK, JR.
Attorneys

SEPTEMBER 2005

Hartman, the question presented in the petition in this case is whether the absence of probable cause is an element of a claim of retaliatory *prosecution*, Pet. i, and the issue of retaliatory *investigation* is not "fairly included therein," Sup. Ct. R. 14.1(a). Second, the court of appeals did not separately address a claim of retaliatory investigation, and petitioners cite no precedents from any court that has. (The only case cited by petitioners on that question is the initial decision of the court below, see Pet. 17-18, which was vacated when the court issued the decision of which petitioner seeks review.) Third, Izen's retaliatory-investigation claim is without merit. Since an investigation, unlike a prosecution, does not require probable cause, see, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57 (1964), a claim of retaliatory investigation, if such a claim exists at all, should require *more* than a claim of retaliatory prosecution, not less, as petitioners suggest (Pet. 18). At a minimum, petitioners cannot show that Izen had a *clearly established* right to be free from an investigation, supported by evidence of wrongdoing, that was allegedly motivated by his speech.

Supreme Court, U.S.
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No. 05-64

IN THE

Supreme Court of the United States

JOE ALFRED IZEN, JR. AND KAREN SUTER IZEN,

Petitioners,

v.

TERRANCE CATALINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

September 2005

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REPLY BRIEF FOR PETITIONER

Respondent acknowledges that there is a circuit conflict on the question presented in this case. *See* Br. in Opp. 6, 8-9. Indeed, Respondent concedes that this case "presents the same question" as *Hartman* v. *Moore*, cert. granted, No. 04-1495 (June 27, 2005). Respondent nevertheless contends that the petition should be denied or, "[i]n the alternative," held pending the Court's decision in *Hartman*. Br. in Opp. 11. Respondent contends that denial is appropriate because he "is entitled to qualified immunity regardless of whether the absence of probable cause is an element of a claim of retaliatory prosecution." Br. in Opp. 6. This is not so. Respondent may not be entitled to qualified immunity, and therefore the Court should, at a minimum, hold the petition pending the decision in *Hartman*. Alternatively, the Court may wish to grant the petition and consider this case together with *Hartman*.

1. Respondent's sole argument for denial of the petition is that he is entitled to qualified immunity regardless of this Court's resolution of the question presented by the petitions in this case and in *Hartman*. That argument is incorrect for several reasons.

First, Respondent fails to inform the Court that the Fifth Circuit's initial decision in this case unanimously *rejected* his qualified immunity claim. The court of appeals stated: "It has long been the law of this circuit that government officials violate the First Amendment by undertaking a prosecution 'in retaliation for or to deter the exercise of constitutionally protected rights.'" Pet. App. 24a (quoting *Wilson* v. *Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979)). Accordingly, the court of appeals concluded: "A reasonable agent would not have believed it permissible to investigate and prosecute an attorney in order to discourage him from opposing the IRS." *Id.* at 24a. In its opinion on rehearing, the court of

appeals found that it did not need to reach the qualified immunity question. *Id.* at 11a n.9. Thus, the only Fifth Circuit decision in this case that addressed the qualified immunity issue held that Respondent is *not* entitled to qualified immunity. If this Court were to affirm the D.C. Circuit's decision in *Hartman*, the Fifth Circuit is likely to reinstate its unanimous ruling on qualified immunity.[1]

Second, even if the Fifth Circuit had not provided direct evidence that it is likely to reject Respondent's qualified immunity claim, that court should be allowed to decide the issue in the first instance. If this Court affirms the D.C. Circuit's decision in *Hartman*, the district court's ruling that Respondent is entitled to qualified immunity will be left as the sole basis for the district court's judgment in this case. Petitioner should not be foreclosed from obtaining appellate review of the qualified immunity issue.

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[1] Respondent contends that when Petitioner was indicted in 1995, the Fifth Circuit had already "held that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must establish 'all the elements of the common law tort' of malicious prosecution." Br. in Opp. 10 (quoting *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994). Respondent's investigation of Petitioner began in 1990, before the Fifth Circuit's decision in *Johnson*. *See* Pet. 3. Moreover, the Fifth Circuit's initial opinion in this case cited *Johnson*, and noted that "the government need not have even reasonable suspicion to undertake an investigation," but held that "this is beside the point." Pet. App. 18a-19a. The Fifth Circuit explained that Petitioner's "claim, properly understood, is not that [Respondent] violated the First Amendment by undertaking an investigation without reasonable suspicion, but rather that he violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against [Petitioner] for his advocacy on behalf of unpopular criminal tax defendants." *Id.*

Third, this Court has already declined the government's invitation to decide the qualified immunity issue. In *Hartman*, the D.C. Circuit—like the Fifth Circuit in its initial opinion in this case—rejected the defendant's qualified immunity argument. *Moore* v. *Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2005). The government sought certiorari on both the qualified immunity issue and the First Amendment retaliation issue, but the Court granted review only on the First Amendment issue. *See Hartman*, 125 S. Ct. 2977 (2005) (limiting the grant of certiorari to the first question presented). Having declined to decide the qualified immunity issue in *Hartman*, the Court should not undertake to effectively decide that issue in this case.[2]

Fourth, Respondent is incorrect in asserting (Br. in Opp. 10) that the Court's decision in *Hartman* cannot have any bearing on the qualified immunity issue in this case. In *Hartman*, the government argues that the standard for proving governmental retaliation in violation of the First Amendment is more stringent when retaliation takes the form of a criminal prosecution than when it takes some other form, such as an adverse employment decision. *Id.* at 8. If the Court concludes that the standard it established in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), applies to retaliatory prosecution claims, its reasoning will have implications for the qualified

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[2] The D.C. Circuit's rejection of the defendant's qualified immunity defense in *Hartman* further undermines Respondent's contention that he is undoubtedly entitled to qualified immunity in this case. Respondent contends (Br. in Opp. 10) that he is entitled to qualified immunity because Petitioner was indicted in 1995, prior to the first court of appeals decision squarely holding that probable cause does not defeat a claim of retaliatory prosecution. The charges in *Hartman* were filed even earlier, in 1988. *See id.*

immunity question. Indeed, the Fifth Circuit's initial decision in this case rejected Respondent's qualified immunity claim under reasoning based on *Mount Healthy* and cited *Mount Healthy* in support of its ruling. *See* Pet. App. 24a ("If substantially motivated by a desire to retaliate against Izen for his association with and representation of tax defendants . . . Catalina's actions were not objectively reasonable."); *id.* at 19a n.7 (citing *Mount Healthy*).

2. The Court may wish to grant the petition because, unlike *Hartman*, this case presents the First Amendment issue in the context of a retaliatory investigation as well as a retaliatory prosecution. As noted above, Respondent's argument is based on a purported distinction between retaliatory prosecutions and other government actions that are concededly subject to the *Mount Healthy* standard. Br. in Opp. 6-8. Consideration of the criminal investigation context may help the Court explore where the constitutional lines should be drawn. In particular, as Respondent correctly notes, an investigation does not require probable cause. Br. in Opp. 11 n.5 (citing *United States* v. *Powell*, 379 U.S. 48, 57 (1964)). It follows that absence of probable cause cannot be an element of a retaliatory investigation claim. The government nevertheless argues that retaliatory investigations should be exempt from the *Mount Healthy* standard, and should require an even stricter standard of proof than the one it advocates for retaliatory prosecution claims. Indeed, the government makes the surprising suggestion that a claim of retaliatory criminal investigation in retaliation for the exercise of rights protected by the First Amendment may not "exist[] at all."[3] Br. in Opp. at 11 n.5.

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[3] *Hartman* will be argued at the earliest during the Court's January Session. If the Court is inclined to grant the petition (...continued)

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in this case should be held pending the Court's decision in No. 04-1495, *Hartman* v. *Moore*.

Respectfully submitted,

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

September 2005

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in this case, Petitioner has no objection to expediting the briefing schedule so that the oral argument in this case can be heard at the same time as the oral argument in *Hartman*.